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Moore, Robert, 1925-.

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Les volumes rassemblent, autour des trois thèmes mentionnés plus haut, une trentaine de textes de langue française ou anglaise, canadiens ou américains, publiés par divers spécialistes de la question entre 1960 et 1972. Il vise à répertorier la documentation publiée sur le sujet de façon à faciliter les prises de position éventuelles du ministère de l'Education dans le domaine.

Type de document: a
Auteur de l'analyse: ar

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DOCUMENTATION SUR LE DROIT D'AUTEUR

1

DOCUMENTS DIVERS

concernant les droits des professeurs sur le matériel audio-visuel produit dans les institutions d'enseignement

Documents compilés par Robert Moore
S.G.M.E.

février 1973

Documents concernant les droits des professeurs sur le matériel audio-visuel produit dans les institutions d'enseignement

1. Documents canadiens

BRIEN, Raymond et autres, Echange de documents audio-visuels et droits d'auteur (document de travail d'un comité réuni par la Direction générale de l'enseignement collégial).

Collège de Sherbrooke, Politique, procédures et recommandations du comité sur les droits d'auteur relatifs à la production et à l'utilisation des documents audio-visuels réalisés en collaboration avec le Service audio-visuel du C.E.G.E.P. (document de travail).

Collège de Trois-Rivières, Lettre d'entente entre le Syndicat des professeurs du Collège d'enseignement général et professionnel de Trois-Rivières et le C.E.G.E.P. de Trois-Rivières (premier projet).

Collège de Trois-Rivières, Lettre d'entente relative à l'enseignement audio-visuel entre le Syndicat des professeurs du C.E.G.E.P. de Trois-Rivières et le C.E.G.E.P. de Trois-Rivières (projet revisé).

Memorial University of Newfoundland (Educational Television Centre), Educational Media Policy Guidelines.

The Ontario Universities' Television Council, Preface to a Statement of Policy on Educational Television, O.U.T.C., 137 Gilmour Hall, McMaster University, Hamilton, Ontario (ce document comporte un appendice très important du Professor R. F. Gosse, Copyright and the University Lecture).

Scarborough College (University of Toronto), Legal Rights and Videotape, dans John A. Lee, Test Pattern. Instructional Television at Scarborough College, University of Toronto, University of Toronto Press, 1971, pp. 107-113.

Teachers' Etv Rights: a First Statement, dans META Newsletter, vol. 3, no 4, July 1963.

Université Laval, Droits d'auteur en matière d'enregistrement pour l'enseignement télévisé dans Au fil des Evénements, vol. 6, no 5, 8 octobre 1970.

Université du Québec, Rapport du groupe de travail sur la télé-université, Tome I, 3.2.2.2 Les droits d'auteur, p.93.

Université du Québec, Contrat entre les professeurs et l'U.Q. pour "Permama".

2. Documents américains

Policy of Michigan State University concerning Rights in and Administration of Communication Materials developed with its Resources by its Faculty and Staff for its Educational and Cultural Purposes (draft).

University of Illinois, Policies concerning University - Sponsored Publications, Television and other Recorded Materials.

University of Wisconsin (Madison Campus), Policies concerning University Development and Use of Recorded Instructional Materials, Faculty Document 42, January 13, 1966, Report of the University Radio-Television Committee.

R. B.

DOCUMENT DE TRAVAIL

ECHANGE DE DOCUMENTS AUDIO-VISUELS ET DROITS D'AUTEUR

NOTE: Je désire remercier MM. Jean Savard, Jean-Louis Longtin et Maurice Louvet de leur précieuse collaboration.

Raymond Brien

I. - DROITS D'AUTEUR: REALISATION DE DOCUMENTS PAR LES PROFESSEURS

Le problème des droits d'auteurs chez les professeurs semble aigu dans certains collèges. Dans d'autres, des ententes temporaires ont permis de reporter à plus tard les conflits. Mais "LA" solution idéale n'est pas encore trouvée... et je ne prétends l'avoir découverte ! Toutefois, en ramassant divers éléments de ce casse-tête, j'ai remarqué que les points litigieux étaient les mêmes dans l'ensemble des collèges.

Ces points sont:

1o Qui du collège (producteur) ou du professeur (auteur) est le propriétaire exclusif des droits d'auteur ?

2o Qui peut juger de l'opportunité de l'utilisation du document ?

3o Dans le cas de vente ou de location, les bénéfices nets sont-ils répartis entre les deux parties ?

4o Le professeur peut-il avoir un droit de regard sur son document lors d'une vente ou d'une location ? etc.

5o Le document a-t-il une vie de plus de trois ans ?

... 2

Bien entendu, le professeur n'accepte pas l'argumentation du collège, et se déclare prêt à prouver que son oeuvre est originale, qu'il ne peut la faire à l'intérieur de son horaire régulier, etc... Nous voyons que ce problème dépasse nos limites et que le combat est engagé sur le plan politique: syndicat d'enseignants vs administration.

Il faut donc éviter cette bataille politique et chercher un moyen d'entente ailleurs. Dans un document intitulé "LETTRE D'ENTENTE RELATIVE A LA PRODUCTION DE DOCUMENTS AUDIO-VISUELS (annexe I), vous trouverez, je l'espère, des indications nous permettant de solutionner le problème.

II. - DROITS D'AUTEUR: UTILISATION DE DOCUMENTS NE POUVANT ETRE REPRODUITS SANS AUTORISATION.

Un autre problème aigu ! Dernièrement, "l'U.S. Court of Claims a fait intégralement droit à la demande de Williams et Wilkins en condamnant les reproductions pirates commises par les Bibliothèques nationales..." (1) les bibliothèques avaient reproduit quelques 87,000 copies tout en ne souscrivant que deux abonnements !

Nous savons tous que les producteurs, éditeurs, etc... exercent des pressions auprès des autorités pour faire reconnaître leurs droits. En acceptant le fait qu'ils réussissent

5.

de plus en plus, il nous faut donc trouver un moyen de détenir ces droits. Certains collèges ont pu s'entendre avec des distributeurs de films. A partir de ces expériences, je vous propose donc un autre modèle d'entente ! (annexe II).

Raymond Brien.

(1) Vient de paraître, vol 8, no 2, juin 1972

NOTE: La prochaine convention collective des enseignants devrait résoudre quelques problèmes comme le montant d'argent accordé au professeur lorsqu'on retient ses services durant la période des vacances, etc...

DOCUMENT DE TRAVAIL

(ANNEXE I)

LETTRE D'ENTENTE RELATIVE A LA PRODUCTION DE DOCUMENTS AUDIO-VISUELS

entre

LES PROFESSEURS DU COLLEGE.....

et

LE COLLEGE .....

Presses UL

~~Contrat~~

1. - DEFINITION:

1.1 Par droits d'auteur on entend tous les droits moraux que possède un auteur (droits de reproduction, de diffusion, d'utilisation, etc...) / adaptation, production,

1.2 Par documents on entend tous les documents produits à l'aide des services techniques du collège.

1.3 Par professeur on entend le ou l'équipe de professeurs toute personne ou réalisateurs participant à la production de documents.

1.4 Par collège on entend les collèges d'enseignement général et professionnel de la province de Québec.

1.5 Par parties on entend le professeur et le collège.

2. - ENTENTE ENTRE LES PARTIES

2.1 Le collège détient exclusivement tous les droits d'auteur. Il s'en assure l'exclusivité dans un contrat de service accepté par le professeur et selon les dispositions de la convention collective en vigueur. des documents produits par le [illegible]

2.2 Le collège s'engage à laisser le professeur libre d'utiliser le document dans ses périodes de cours. Toutefois, le collège pourra utiliser le document à d'autres fins à l'intérieur du collège.

2.3 S'il y a vente ou location du document, le collège s'engage à verser au professeur un montant équivalent à 10% du prix net du matériel servant de support au document.

2.4 Le professeur a droit de regard sur le document pour une période de trois ans partant du jour de sortie du document.

3. - DUREE DE L'ENTENTE

3.1 Cette entente est valable pour cinq ans à partir de la date de la signature.

4. - DISPOSITIONS PARTICULIERES

4.1 Le tout sans préjudice aux dispositions de la convention collective en vigueur.

PROFESSEUR

COLLEGE

Cette entente a été approuvée par le syndicat des professeurs du Collège ..... lors de sa réunion tenue le ... .

PRESIDENT

DOCUMENT DE TRAVAIL

(ANNEXE II)

LETTRE D'ENTENTE ENTRE LE DISTRIBUTEUR

_____

(raison Sociale)

et

LE COLLEGE _____

Le distributeur ..... cède ses droits de reproduction, diffusion, insertion, utilisation, etc... au collège ..... pour une période de ..... moyennant une somme de .....

Cette somme équivaut au nombre de minutes utilisées dans le cas de film au prix de $..... la minute.

Dans le cas de disques, elle équivaut à $..... le disque 45 tours, $..... le disque 33 tours.

NOTE: Il nous faut trouver une formule nous permettant d'acquérir les droits d'auteurs sur les différents supports, tels le ruban magnétique, le ruban magnétoscopique, la diapositive, l'acétate et autres. Il me manque beaucoup d'information sur l'achat de ces droits. Il en est de même pour la copie d'émissions-tv, émissions-radio. Il nous faudrait savoir ce qu'en pensent les différents distributeurs.

Raymond Brien.

Monsieur Gilles Bellehumeur,
D.S.P.,
Pavillon 2.

Le 14 janvier 1972

Monsieur,

Formé à la suite de votre demande du 5 octobre 1971 (mémo 22977), le "Comité des droits d'auteur" vous présente, telles qu'acceptées lors de sa réunion du 6 janvier 1972, les "Politiques, procédures et recommandations" sur les droits d'auteur relatifs aux documents audio-visuels réalisés par le communauté collégiale en collaboration avec le Service audio-visuel du CEGEP.

Les membres de ce Comité - MM. Joseph Franchomme, Hercule Gaboury, Alexandre Migneault, Roger Plamondon, Jean Savard et le président-secrétaire - ont participé, dans un esprit de franche collaboration, aux quelque 21 heures consacrées aux neuf séances d'étude tenues par le Comité depuis le 15 octobre 1971 jusqu au 6 janvier 1972 inclusivement.

Vu l'état embryonnaire des politiques du Québec et la pauvreté des renseignements recueillis sur le sujet, vu la complexité des aspects juridiques des droits d'auteur et l'absence de réponse aux conseils légaux demandés au Secrétaire général du Collège le 20 octobre 1971, le Comité a opté pour l'étude des aspects pratiques dans la mise au point de politiques et procédures propres à favoriser la créativité de chacun des membres de la communauté collégiale soucieux d'intégrer les moyens audio-visuels à son activité éducative.

Le Comité ne prétend pas avoir fait une étude exhaustive de ce sujet vaste et complexe: plusieurs aspects d'ordre juridique, contractuel, pédagogique, budgétaire,..nécessiteraient une étude plus poussée.

Conscient des limites de son étude, le Comité a décidé de poursuivre son travail dans le sens des deux dernières recommandations (section C) faites au Collège.

Le "Comité des droits d'auteur" soumet à votre attention les résultats de son étude et compte sur votre offre (5 octobre 1971)"de faire le nécessaire pour qu'une politique et procédure puisse s'établir afin que le Collège encourage et reconnaisse ainsi les efforts..." de créativité et d'audio-visualisation de toute la communauté collégiale à l'intérieur des activités éducatives du CEGEP.

Bien à vous,

Paul Doucet

PD-pf

Paul Doucet, prés.-secrétaire,
"Comité des droits d'auteur",
Collège de Sherbrooke.

Document de travail

Collège de Sherbrooke, le 14 janvier 1972

Compte tenu des précisions fournies par le "Comité des droits d'auteur" dans sa lettre de présentation du présent document, voici, telles qu'acceptées lors de sa réunion du six (6) janvier 1972, les POLITIQUES (A), PROCEDURES (B) et RECOMMANDATIONS (C) du Comité sur les droits d'auteur relatifs à la production et à l'utilisation de documents audio-visuels réalisés en collaboration avec le Service audio-visuel du CEGEP.

A- POLITIQUES

1- Le Collège favorise en tout temps et par tous les moyens la créativité de toute la communauté collégiale qui, par le temps qui court, s'exprime surtout (de plus en plus) par les moyens audio-visuels de tout genre (mass media).

2- Le Collège doit favoriser l'accessibilité générale à tous ces moyens d'expression et de diffusion (mass media).

3- Le Collège doit reconnaître les efforts de tous les membres de la communauté collégiale soucieux d'adapter leur activité respective aux exigences du monde des communications par l'utilisation adéquate des moyens audio-visuels.

4- En ce qui concerne les droits d'auteur relatifs à la production et à l'utilisation des documents audio-visuels produits par la communauté collégiale en collaboration avec le Service audio-visuel du Collège, les politiques et procédures sont de nature à favoriser toute audio-visualisation nécessaire dans le cadre des activités éducatives qui se déroulent au Collège et/ou qui répondent aux besoins du milieu desservi par le CEGEP.

5- Le(s) auteur(s) a (ont) un droit de regard exclusif sur son (leur) oeuvre. Les modalités de production et de diffusion des documents font l'objet d'une entente entre le(les)auteur(s) avec le Collège.

6- Le Collège et le(s) auteur(s) favorisent un emploi maximum des documents audio-visuels produits en collaboration avec le Service audio-visuel suivant les modalités établies à ce sujet.

7- Compte tenu de la teneur et de l'importance des documents audio-visuels à produire en collaboration avec le Service audio-visuel, le Collège favorise l'engagement de personnes compétentes requises par ces projets, de préférence parmi le personnel à l'emploi du Collège.

8- Dans la production, la reproduction et l'utilisation des documents audio-visuels au CEGEP, le(s) auteur(s) et/ou le Collège et ses Services s'engagent à respecter les droits d'auteur et autres privilèges liés aux documents de tout genre ("mass media") produits, achetés, loués ou empruntés par un ou plusieurs membre(s) de la communauté collégiale.

9- Le Collège doit faire les démarches requises pour obtenir l'autorisation du titulaire du droit d'auteur de reproduire, en tout ou en partie, toute oeuvre nécessaire à la production de documents utiles à la communauté collégiale.

2.....

10- Le Collège doit faciliter à le(aux) auteur(s) les démarches nécessaires pour le dépôt légal des documents produits et pour l'obtention d'un copyright sur ces oeuvres.

11- Le Collège accepte d'encourager la production de documents audio-visuels sans égard à la durée de leur utilisation.

12- Le(s) auteur(s) et le(s) département(s) concernés sont les premiers responsables de la valeur du contenu des documents à produire.

B- PROCEDURES

Le Collège de Sherbrooke et le(s) auteur(s) conviennent de l'entente contractuelle suivante concernant la production et la diffusion du document audio-visuel intitulé".....

.....";

a) Usage (diffusion)interne (Choix d'un ou de plusieurs des articles suivants).

1- Une seule copie sera produite pour l'usage exclusif de le(les) auteur(s);

2-.....copies seront faites et distribuées de la façon suivante:
.....exemplaire(s) au Service audio-visuel du Collège;
.....exemplaire(s) à le(les) auteur(s);
.....copies distribuées de la façon suivante:
.....exemplaire(s) pour le groupe de travail formé de.....
.....;
.....exemplaire(s) au(x) département(s) de.....
.....;
.....exemplaire(s) à l'audio-vidéothèque du Collège;
.....exemplaire(s) laissé(s) à la disposition de.....
.....

3- .....copies numérotées de la façon suivante:

00.....
01.....
02.....
03.....
.....

4- Le Collège fera le nombre requis de copies pour répondre aux besoins de la communauté collégiale.

5- Autre formule d'entente:.....
.....

Entente contractuelle signée le.....19...

par les deux parties:

Collège.....

Auteur(s).....

b) Usage (diffusion) externe (Choix d'un ou de plusieurs des articles suivants)

Compte tenu de la valeur du document audio-visuel et du taux de participation du Service audio-visuel (matériel et temps consacrés à la production,...) à sa production, le(les) auteur(s) et le Collège conviennent de l'entente suivante concernant chaque copie du document intitulé".....

....."
vendue ou échangée avec d'autres institutions d'enseignement ou organismes:

1- Le Collège achète les droits d'auteur moyennant le paiement de$.....
à le (aux)auteur(s).....

2- Le(les) auteur(s) reçoit (reçoivent).....% du prix de vente fixé à $.....

3- Le Collège peut vendre ou échanger le dit document sans payer des droits ou privilèges à le(aux) auteur(s).....

4- Le(les)auteur(s) peut (peuvent) obtenir des droits de diffusion exclusifs à la (aux)condition(s) suivante(s):

- permettre au Collège de faire.....copie(s) pour usage interne;
- défrayer le coût du matériel et du temps de production évalués à $.....requis pour la réalisation du dit document;
- .....
- .....

5- Autre formule d'entente:.....

.....

.....

Entente contractuelle signée le.....19...

par les deux parties:

Collège.....

Auteur(s).....

.....

5.....

C- RECOMMANDATIONS

Pour faciliter et orienter la mise en application au Collège des politiques et procédures ci-haut formulées, le Comité sur les droits d'auteur concernés fait les recommandations suivantes au CEGEP:

1- En priorité et compte tenu des recommandations douze (12) et treize (13), que la politique numéro huit (8) s'applique avec prudence au CEGEP aussi longtemps que la politique numéro neuf (9) n'aura pas été appliquée au Collège.

A cette fin, que le Collège fournisse le plus tôt possible une liste des documents non protégés par un copyright.

2- Que le Collège établisse un budget qui permette la mise sur pied, à brève échéance, des ressources matérielles et humaines nécessaires pour atteindre, dans le contexte actuel du CEGEP, les objectifs fixés (section A).

3- En plus des aspects pécuniaires prévus dans les procédures, le Collège doit tenir compte des efforts de créativité de toute la communauté collégiale dans l'évaluation, dans l'attribution et dans la pondération de l'activité respective de chacun des membres de cette communauté.

Cette pondération peut impliquer un dégagement partiel ou total de la (de personne(s)concernée(s) sans préjudice à la tâche attribuée aux autres membres de la communauté collégiale.

Ce dégagement total ou partiel ne serait en aucune façon absorbé par les autres professeurs.

4- Que le Collège voie à aménager adéquatement un laboratoire permettant l'expression de la créativité par les moyens audio-visuels mis à la disposition de toute la communauté collégiale.

Ce laboratoire renfermerait tous les types de moyens audio-visuels de production requis ainsi que le personnel-ressource nécessaire pour faciliter leur utilisation adéquate.

5- Que le Collège voie à l'aménagement adéquat d'un autre atelier consacré à l'étude des différentes formules d'intégration des moyens audio-visuels à l'enseignement ou d'audio-visualisation nécessaire aux activités éducatives qui se déroulent au CEGEP. Ce local doit remplir toutes les conditions matérielles nécessaires au visionnement et/ou à l'écoute de documents audio-visuels de tout genre.

6- Qu'un certain nombre de locaux dits académiques (le plus grand nombre possible) soient munis d'appareils de diffusion de documents audio-visuels (magnétophones à cassettes et à bobines ouvertes, rétroprojecteurs, projecteurs 35 mm, écrans et autres, selon les besoins du(des) département(s) ou des usagers) et aménagés pour l'écoute et le visionnement adéquats de ces documents.

7- Que, dans les grands locaux (auditoriums, gymnases, palestre, amphithéâtres,....), on installe à brève échéance un système de visionnement et d'amplification adéquats et qu'un technicien, au besoin, assiste les usagers de ces locaux lors de la diffusion de documents audio-visuels.

8- Qu'un système de subvention soit créé pour la production de documents audio-visuels avec ou sans la collaboration du Service audio-visuel du Collège.

9- Que tout argent perçu par le Collège pour la vente de documents audio-visuels ou pour le rachat de droits de diffusion exclusifs par le (les) auteur(s) soit utilisé pour la production de documents audio-visuels demandés par la communauté collégiale, sans préjudice au budget alloué au Collège à ce sujet.

10- Dans le choix des critères utilisés pour établir les priorités dans la production de documents audio-visuels faite en collaboration avec le Service audio-visuel, que le Collège tienne compte des priorités établies par chacun des départements concernés et des possibilités techniques de production du Service audio-visuel.

11- Que le Collège assure auprès de toute la communauté collégiale la diffusion adéquate des politiques et procédures officielles sur les droits d'auteur étudiés par le Comité.

12- Chaque fois qu'un membre du Comité en fait la demande, le Comité doit se réunir pour étudier les interprétations données aux politiques et procédures soumises par le dit Comité et faire ses recommandations au Collège.

13- Chaque fois qu'un membre du Comité en fait la demande, le Comité se réunit pour réétudier les politiques et procédures, les compléter et les adapter aux besoins du milieu constamment en évolution.

"Politiques, procédures et recommandations"

présentées à M. Gilles Bellehumeur, D.S.P., le 14 janvier 1972, par le

"Comité des droits d'auteur"

Paul Doucet, prés.-secrétaire

Joseph Franchomme

Hercule Gaboury

Alexandre Migneault

Roger Plamondon

Jean Savard

Les Trois-Rivières,
le 1er octobre 1971.

Monsieur le Président,
Monsieur le Directeur général,
Monsieur le Secrétaire général,

Je fais parvenir à chacun de vous une copie de la présente, afin de vous informer du désir de l'exécutif du Syndicat des Professeurs du CEGEP de Trois-Rivières, d'obtenir audience à la réunion du Conseil d'Administration du Collège, laquelle réunion se tiendra le 6 octobre prochain.

Le but de cette audience est de présenter officiellement au Collège la lettre d'entente, ci-jointe, d'éclaircir tout point de la dite lettre qui, éventuellement, semblerait obscur, et surtout d'exposer la position du Syndicat des Professeurs face à l'introduction de moyens audio-visuels, tels que mentionnés dans la dite lettre, dans l'enseignement collégial.

Par conséquent, je demande à Monsieur Raymond Loranger de faire parvenir une copie de la lettre d'entente à chacun des membres du Conseil d'Administration, d'en inscrire le sujet à l'ordre du jour, et enfin de nous accorder audience, si tel est le désir du Conseil d'Administration du Collège.

Je vous remercie de votre bienveillante attention et vous prie d'agréer mes sentiments les meilleurs.

Jean-Pierre Boyte

Jean-Pierre Boyte,

Président du Syndicat des Professeurs du Collège d'Enseignement Général et Professionnel de Trois-Rivières.

JPB/ma

REÇU LE
OCT 4 1971

ENTRE

LE SYNDICAT DES PROFESSEURS DU COLLÈGE

DE L'ENSEIGNEMENT GÉNÉRAL ET PROFESSIONNEL DE TROIS-RIVIÈRES

ET

LE COLLÈGE D'ENSEIGNEMENT GÉNÉRAL ET PROFESSIONNEL DE TROIS-RIVIÈRES

SUJET : ENSEIGNEMENT COLLÉGIAL PAR BANDES PÉDAGOGIQUES ET/OU PAR BANDES MAGNÉTIQUES.

ARTICLE I : Par enseignement collégial par bandes magnétoscopiques et/ou par bandes magnétiques, on entend des cours réguliers ou des périodes de cours réguliers, tels qu'ils sont définis dans les cahiers de l'enseignement collégial, et qui sont enregistrés sur bandes magnétoscopiques et/ou sur bandes magnétiques par des professeurs engagés par le Collège, à temps complet ou à temps partiel.

ARTICLE II : Le Collège est propriétaire des bandes magnétoscopiques et des bandes magnétiques pour la durée de cette lettre d'entente. Toutefois cette propriété est asservie aux différentes servitudes contenues dans cette lettre d'entente. Le Collège prend toutes les précautions nécessaires pour assurer la conservation des bandes magnétiques et des bandes magnétoscopiques.

ARTICLE II

A : Le Collège se charge d'entreprendre les démarches nécessaires pour obtenir les "copyright" afin que soient protégés les droits de toutes les personnes concernées, et, ce, dans un délai de 15 jours ouvrables suivant la fin de la production du dit document.

ARTICLE IV

B : Le ou les professeurs participants peuvent exiger que les bandes magnétiques et/ou les bandes magnétoscopiques soient effacées au moment où ces derniers le jugent à propos, après le consentement de l'assemblée de département.

ARTICLE III : Le Collège ne peut louer, ni prêter, ni donner, ni vendre, ni acheter des copies ni des originaux de bandes magnétiques et/ou de bandes magnétoscopiques de cours réguliers ou de périodes de cours réguliers; sauf dans les cas d'achat, de don, de prêts ou de location de documents enregistrés sur bandes magnétoscopiques et/ou sur bandes magnétiques, provenant de l'extérieur, servant comme complément didactique.

ARTICLE III

A : Toutefois en ce qui concerne le canal 9: compte-tenu que l'utilisation du canal 9 pour l'année 1971-1972 vise à donner un meilleur service aux étudiants réguliers, le Collège emploiera ce canal à titre expérimental

durant l'année 1971-1972, pour la formulation de son cours, du choix, tant la composition et le projet auront établis conjointement par le Collège et le Syndicat, dans les trente jours suivant la signature de cette lettre d'entente, présentera en juin 1972 un rapport évaluant cette expérience.

ARTICLE IV : Pour des fins de démonstration pédagogique ou de publicité, le Collège pourra prêter gratuitement des bandes magnétoscopiques ou des rubans magnétiques. Il devra avoir l'assentiment de un des professeurs concernés, ainsi que celui du département.

ARTICLE V : La commission pédagogique sera obligatoirement consultée sur la politique générale du Collège relative aux aspects pédagogiques de l'enseignement par bandes magnétoscopiques et/ou par bandes magnétiques.

Lors de l'introduction de cours réguliers ou de périodes de cours réguliers enregistrés sur bandes magnétiques et/ou magnétoscopiques, l'assemblée départementale décidera, après consultation de la commission pédagogique, de la méthodologie à utiliser.

ARTICLE VI

A: Pour les sessions d'automne, de l'hiver, de l'été, de même que pour les cours du soir 1971-1972, il ne peut y avoir d'enregistrement, ni utilisation première, de bandes magnétiques et/ou magnétoscopiques, sans le consentement du ou des professeurs concernés et de l'assemblée départementale.

ARTICLE VI

B : Avant la réutilisation des bandes magnétiques ou magnétoscopiques, un consensus entre le ou les professeurs concernés, l'assemblée de département, le Collège et l'Exécutif du Syndicat sera requis.

ARTICLE VI

C : Dans le calcul des périodes/élèves/semaines, pour la détermination du nombre de professeurs par département, les cours réguliers utilisant des bandes magnétiques et/ou magnétoscopiques seront comptés comme tout autre cours. Les cours des départements conserveront la pondération qui leur est assignée par les cahiers de l'enseignement collégial.

ARTICLE VII: Pour la session d'été, de même que pour les cours du soir, le professeur qui utilise des bandes qu'il a lui-même enregistrées, sera rétribué selon la pondération assignée aux cours par les cahiers de l'enseignement collégial et au taux horaire prévu par la convention collective. On tient compte du nombre des étudiants qui oblige à la formation de plus ou moins de sous-groupes, selon la méthodologie utilisée et approuvée par l'assemblée départementale.

ARTICLE VIII: Pour la session d'été, de même que pour les cours du soir, l'utilisation des bandes magnétiques et/ou magnétoscopiques, utilisées sur recommandation de l'assemblée de département, par un autre professeur que l'auteur, seront payées selon l'exemple suivant:

EXEMPLE: Le cours de philosophie 101 est préparé [illegible]. L'utilisation par ses auteurs des bandes magnétiques et magnétoscopiques qui compte pour une période, sera payé au montant prévu $17.50 (ou tout autre montant fixé par la convention) X 15 semaines. On ne tient pas compte du nombre des étudiants. Le professeur qui donne le cours sera payé $17.50 X 2 périodes X 15 semaines X nombre de sous-groupes. On tient compte du nombre des étudiants, qui oblige à la formation de plus ou moins de sous-groupes, selon la méthodologie utilisée et approuvée par l'assemblée départementale.

ARTICLE IX : Pour les sessions d'automne et d'hiver, les bandes magnétiques et/ou magnétoscopiques enregistrées pour le cadre d'un cours du soir ou d'été, utilisé sur la recommandation de l'assemblée du département, l'équivalence en P/E/S est accordée à son ou ses auteurs.

ARTICLE X : Advenant désaccord sur l'application ou l'interprétation de la présente entente, le Syndicat ou le ou les professeurs concernés peuvent se prévaloir de la procédure de griefs prévue à la convention collective 1968-1971, comme si elle était récitée à la présente entente. Cependant les deux parties s'entendent sur la procédure d'arbitrage suivante:

"Si le syndicat ou un professeur ou des professeurs ne sont pas satisfaits de la décision du Collège, à la suite du recours aux mécanismes de grief prévus dans la convention collective 1968-1971, ils doivent dans les quinze jours ouvrables suivant l'expiration du dernier délai prévu au paragraphe 32.10 de la dite convention, donner un avis écrit à un arbitre choisi après entente entre les deux parties.

"L'arbitre doit fixer la date de la première séance d'arbitrage dans les dix jours ouvrables suivant la réception du ou des griefs. L'arbitre doit rendre sa décision dans les dix jours qui suivent la date où la preuve est terminée. Il doit en communiquer la décision à chacune des parties, en leur faisant parvenir une copie signée.

"La décision du tribunal lie les parties et doit être exécutée dans les plus brefs délais possibles, et ce, avant l'expiration du délai prévu à la dite décision.

"L'arbitre décide des griefs conformément aux dispositions de la présente lettre d'entente, il ne peut ni la modifier, ni y ajouter ou y soustraire quoi que ce soit."

Les frais et honoraires des arbitres seront payés par la partie patronale. La partie patronale met sur pied un greffe dont elle assure l'administration.

Le Collège de Trois-Rivières et le Syndicat des Professeurs du CEGEP de Trois-Rivières s'entendent pour que:

"Monsieur   agisse comme arbitre dans les cas de grief soumis à l'arbitrage, selon la procédure décrite dans cette lettre d'entente."

.../

ARTICLE XX : La présente fait partie intégrante du contrat individuel de chaque professeur concerné et y est rapportée intégralement.

ARTICLE XXI : Cette lettre d'entente est valable jusqu'au 30 septembre 1972, sans préjudice toutefois de toute nouvelle convention collective.

Approuvé par l'Exécutif du Syndicat le 23 août 1971.

Soumis à l'assemblée générale des professeurs pour appréciation de la part des professeurs du Syndicat du Collège d'Enseignement Général et Professionnel de Trois-Rivières, le 25 août 1971. Approuvée par la dite assemblée, ce 25 août 1971.

Signé le _____ jour _____ mois _____ année ____

_____ _____

_____ _____

LE SYNDICAT LE COLLÈGE

PROPOSITION DU COLLEGE DE TROIS RIVIERES NON ENCORE ACCEPTEE PAR LA FNEEQ

LE 22 MAI 1972

LETTRE D'ENTENTE RELATIVE
A L'ENSEIGNEMENT AUDIO-VISUEL

entre

LE SYNDICAT DES PROFESSEURS DU CEGEP DE TROIS-RIVIERES

et

LE CEGEP DE TROIS-RIVIERES

A) PRINCIPES GENERAUX

1) Définition et domaine couvert par la présente lettre

a) Par rubans, on entendra rubans magnétoscopiques et/ou rubans magnétiques.

b) Par cours, on entendra une partie ou le tout d'une période de cours réguliers, équivalent à 50 minutes, tels que décrits dans les cahiers de l'enseignement collégial.

c) Par professeur TV, on entendra tout professeur régulier du collège à temps complet ou à temps partiel qui enregistre un cours sur rubans, durant ses heures de disponibilité.

d) Par an (ou année), on entendra une période de 12 mois consécutifs.

e) Par partie, on entendra le collège d'enseignement général et professionnel de Trois-Rivières d'une part, et d'autre part le syndicat des professeurs du CEGEP de Trois-Rivières.

f) Cette lettre d'entente est valable jusqu'au 30 mai 1975 sans préjudice toutefois de toute nouvelle convention collective.

2) Comité des droits de l'Audio-Visuel (C.D.A.V.)

a) La surveillance des faits et gestes concernant les droits visés par cette lettre d'entente sera la principale responsabilité de ce dit comité. De plus, il sera à même de faire des recommandations aux parties impliquées sur des amendements ou nouvelles propositions à la présente lettre d'entente; ainsi que de faire des recommandations aux parties sur la manière dont les droits de cette lettre sont respectés dans la diffusion et télédiffusion externe des rubans.

...2

En particulier, quand il s'agira de louer, prêter, donner ou vendre des copies de rubans magnétiques et/ou magnétoscopiques, ainsi que de préciser les conditions de ces ventes, location, don ou prêt, la décision du comité pour être effective devra être unanime. Pour toute transaction le professeur concerné devra donner son assentiment, assentiment qu'il ne pourra réserver que pour des raisons justifiées auprès du comité.

b) Le comité sera formé du Directeur général du Collège, du Directeur des services pédagogiques, d'un adjoint au D.S.P., du président du Syndicat et de deux professeurs désignés par le Syndicat.

Le président sera choisi alternativement dans les deux parties à tous les ans et pourra conserver son droit de vote.

c) Les convocations ainsi que les ordres du jour devront être envoyés aux deux parties dans les 3 jours précédant chaque réunion.

Les procès-verbaux de toutes réunions devront parvenir aux deux parties dans les 3 jours suivant la tenue de chaque réunion.

Tous les documents ainsi produits devront être affichés dans les mêmes délais, dans tous les départements du Collège.

3) Enregistrement d'un cours

L'enregistrment d'un cours suppose l'assentiment du professeur TV, de l'assemblée départementale concernée et du Directeur des services pédagogiques.

4) Le Collège se charge d'entreprendre les démarches nécessaires pour obtenir les "COPYRIGHT". (au nom du Collège)

B) DROITS DU PROFESSEUR TV

1) Il revient au professeur TV le privilège de décider de la première utilisation des rubans produits.

2) Pour fin de démonstration pédagogique, toute personne autre que les étudiants pour qui le (s) ruban (s) est (sont) préparé (s), le D.S.P. et/ou ses adjoints et les professeurs du département, qui désire visionner ou écouter un ruban devra obtenir la permission écrite du professeur TV concerné.

3) Convenant que la charge d'un professeur au Collège, pour un semestre donné, peut s'établir sur une base d'un PES moyen, le professeur TV pourra voir porter à son crédit le maximum suivant: pour chaque cours produit, les 3/14 du plus grand nombre suivant de:

- la moyenne annuelle du P.E.S. moyen de son département lors de l'année d'enregistrement

- la moyenne annuelle du P.E.S. moyen du Collège lors de l'année d'enregistrement.

...3

Toutefois, s'il le désire, il pourra se prévaloir d'une économie de P.E.S. moindre, à la suite d'une entente avec son département.

4) Les P.E.S. ainsi économisés par le professeur TV serviront soit à produire et à perfectionner son enregistrement TV, soit à toute autre tâche connexe à son enseignement qu'il fera approuver par son département et le Directeur des services pédagogiques.

5) Pour la session d'été, de même que pour les cours du soir, chaque utilisation de rubans sera payée à son ou ses professeurs TV selon les taux horaires prévus par la convention collective.

6) Le Collège s'engage à ne mettre aucun professeur à l'emploi du Collège en disponibilité par suite d'utilisation de rubans.

7) Dans le cas où le professeur TV quitte le Collège, il pourra exercer ses droits en conformité avec les articles C-6, B-3 et B-5 de la présente entente.

8) La présente lettre d'entente fait partie intégrante du contrat individuel d'engagement de chaque professeur TV.

C) DROITS DU COLLEGE

1) Il revient à l'assemblée départementale le droit de décider de l'utilisation des rubans, sans préjudice toutefois à l'article B-1.

2) Le département qui utilise des rubans aura le privilège sur tout autre département d'utiliser à son propre compte les P.E.S. économisés lors de l'utilisation de rubans.

3) Les cours des départements conserveront la pondération qui leur est assignée dans les cahiers de l'enseignement collégial.

4) La commission pédagogique sera obligatoirement consultée sur la politique générale du Collège relative aux aspects pédagogiques de l'enseignement par rubans. L'assemblée départementale concernée décide de la méthodologie de l'enseignement par rubans.

5) Le Collège est le propriétaire des rubans.

6) Le Collège pourra utiliser les rubans dans son propre système de diffusion durant trois ans consécutifs, une fois l'approbation accordée par le professeur tel que prévu à l'article B-1.

...4

7) Pour une utilisation supérieure au délai de 3 ans prévu à l'article C-6, le Collège devra négocier à nouveau la réutilisation des rubans avec le ou les professeurs TV concernés, selon les termes de l'article B-3. Dans le cas contraire, le Collège pourra soit effacer la bande, soit la conserver dans ses archives.

D) RESPECT DES DROITS

Advenant désaccord sur l'application ou l'interprétation de la présente entente, le Syndicat ou le ou les professeurs concernés peuvent se prévaloir de la procédure de griefs prévue à la convention collective 1968-1971, comme si elle était récitée à la présente entente. Cependant, les deux parties s'entendent sur la procédure d'arbitrage suivante:

"Si le Syndicat ou un professeur ou des professeurs ne sont pas satisfaits de la décision du Collège, à la suite du recours aux mécanismes de grief prévus dans la convention collective 1968-1971, ils doivent dans les quinze jours ouvrables suivant l'expiration du dernier délai prévu au paragraphe 32.10 de la dite convention, donner un avis écrit à un arbitre choisi après entente entre les deux parties.

"L'arbitre doit fixer la date de la première séance d'arbitrage dans les dix jours ouvrables suivant la réception du ou des griefs. L'arbitre doit rendre sa décision dans les dix jours qui suivent la date où la preuve est terminée. Il doit en communiquer la décision à chacune des parties, en leur faisant parvenir une copie signée.

"La décision du tribunal lie les parties et doit être exécutée dans les plus brefs délais possibles, et ce, avant l'expiration du délai prévu à la dite décision.

"L'arbitre décide des griefs conformément aux dispositions de la présente lettre d'entente, il ne peut ni la modifier, ni y ajouter ou y soustraire quoi que ce soit."

Les frais et honoraires des arbitres seront payés par la partie patronale. La partie patronale met sur pied un greffe dont elle assure l'administration.

Le Collège de Trois-Rivières et le Syndicat des Professeurs du CEGEP de Trois-Rivières s'entendent pour que:

"[redacted] agisse comme arbitre dans les cas de grief soumis à l'arbitrage, selon la procédure décrite dans cette lettre d'entente."

MEMORIAL UNIVERSITY OF NEWFOUNDLAND

St. John's, Newfoundland

EDUCATIONAL MEDIA POLICY GUIDELINES

Definitions

For the purposes served by this document only, the following definitions will apply:

1. Faculty Member means any person employed by the University to teach either in the area of credit or non-credit work.

2. Department Head means the person to whom the Faculty Member is normally responsible. For example, it may, as appropriate, mean Dean or Director.

3. Media Contracts Committee (referred to as Contracts Committee) means the committee responsible for overseeing all contracts as outlined in this document. This Committee shall consist of the following: one (1) member from each Faculty Council (Junior Division, Arts and Science, Education, Engineering, Medicine, Physical Education); one (1) member appointed by the Director of Educational Television; one (1) member appointed by the Director

of Extramural Studies; one (1) member appointed by the Director of Extension Service; one (1) member appointed by the President.

I. Faculty members engaging in the production of University teaching materials involving television, film, programmed learning, and any other audio-visual equipment (referred to in general as media in this document) will be governed by the general terms and policies herein contained, and by specific written agreements or contracts for each series or production.

II. The responsibility for the formal initiation and acceptance of any series or program will rest with the Department Head primarily concerned. However, if any series involves the creation of a new academic course, that course must be approved in the usual manner.

III. While the University wishes to encourage and support the development of the various teaching media, no faculty member will be forced against his will to prepare these teaching devices.

IV. New Faculty Members may be engaged by the University through the Department Head on such terms as may include the preparation of programs involving the use of media. However, the Department Head concerned will first insure that no appropriate Faculty Member is available at the University before going outside the University to engage a new faculty member.

V. The University acknowledges that the preparation of media teaching materials is time-consuming beyond traditional classroom teaching practices. For this reason, and the recognition that the produced material offers usefulness over an extended period of time, some form of compensation for participating Faculty Members will be given.

VI. In consultation with the Department Head, the Faculty Member concerned, and the producing agency; participants in these educational programs will be compensated through (1) released time prior to and during production, (2) remuneration at rates fixed by the University, (3) residual fees as fixed under agreements for specific projects (off-campus credit, research grants, etc.), (4) combinations of the above.

Such compensation will be determined by prior contract approved by the Contracts Committee.

VII. Unless otherwise agreed in a contract, programs and productions sold or leased to other agencies will return 50 percent of the purchase or lease price after the recovery of production costs to the participating Faculty Members.

VIII. No programs or productions will be sold or leased without the mutual consent of participating Faculty Members and the producing agency.

IX. Except for purposes of evaluation and critique, no use will be made of programs and productions beyond those originally agreed upon without consent of the participating Faculty Members. However, the University retains the right to fair internal use of programs between courses with the consent of the participating Faculty Members without charge. Any conflicts regarding such use will be decided by the Contracts Committee.

X. The Vice-President (Academic) in consultation with appropriate University administrative officials, may withdraw any media from service as necessary.

However, the participating Faculty Members may appeal such withdrawal to the Contracts Committee whose decision will prevail.

XI. Participating Faculty Members, in consultation with Department Heads, are free to withdraw course programs or productions from distribution for cause. Any conflicts regarding such withdrawal may be appealed to the Contracts Committee whose decisions will prevail.

XII. Participating Faculty Members are expected to keep materials current and pertinent to the purposes for which they were created.

XIII. All statements of fact and opinion are the responsibility of the participating Faculty Members, not the producing agency.

XIV. Copyright clearance for written sources (quotations etc.) is the responsibility of the participating Faculty Member.

XV. Copyright clearance for all media materials (film, records, photographs, etc.) used in programs and productions will be the responsibility of the producing agency.

XVI. Programs or productions prepared for one university use, but subsequently used for another purpose will be compensated under a contractural agreement governing the second use. (Examples: on-campus course used off-campus; lecture for university course broadcast to general public.)

XVII. The University retains the right to use media for one year after the death or departure of the participating Faculty Member from the University, unless otherwise specified in a contract. At departure, the University may enter into a written agreement to continue the use of the media for a period longer than one year. The negotiations for such written agreements shall be initiated by the Department Head.

XVIII. Upon the death of a participating Faculty Member, his interest in the programs and productions passes to his estate.

XIX. Normal teaching loads assigned by the Department Head in relation to the use of programs and productions are the province of the Department Head and not the concern of the producing agency, except

as released time compensation must enable the participant to fulfill his obligations to the producing agency.

XX. All written agreements and contracts will be subject to the approval of the Contracts Committee, and no such agreements and contracts are valid until such approval is granted.

PREFACE TO STATEMENT OF POLICY ON EDUCATIONAL TELEVISION

by "The Ontario Universities' Television Council"

Before considering a statement of policy in regard to the use of audio-visual material in university teaching, it is worthwhile to examine briefly the law relating to traditional teaching materials. Professor R. F. Gosse has written a brief but clear study of the problem, attached as Appendix A to this document. The gist of his study is this: Under Canadian copyright law a self-employed lecturer owns the copyright in his lectures both before and after he has delivered them either orally or in written form.

When a lecturer holds an appointment at a university and delivers a lecture in the course of his duties there is considerable doubt whether he or the university holds the copyright in it. At present there are no decisions of our courts interpreting the key words of our copyright act. The decision might go either way. If we assume that the copyright remains in the lecturer, the question arises: would the result be the same, let us say, for a video taped lecture? It probably would be, but we would have to consider the high cost of technical facilities borne by the university and whether a court might not consider this fact as at least giving the university a substantial interest in the product of the effort.

Suppose that the copyright in traditional teaching materials were held to be in the university. There is little doubt that the law would remain the same for a video taped lecture. In these circumstances could a lecturer refuse to "tape" his lectures with impunity, because it would be an extraordinary duty, or would refusal be sufficient cause for his dismissal? If it were finally decided that a lecturer could so refuse, he could then bargain with the university on the terms acceptable for preparing a set of video taped lectures.

If, finally, it should be decided that not only is the copyright to all lectures in the university but also a lecturer is bound to render his services in preparing video taped lectures as part of his normal duties, then only through negotiation with the university administration and collective persuasion by the CAUT nationally and locally, could fair terms be obtained to govern preparation, use, revision and distribution of materials using the new media.

Of course, there is no reason to await judicial decisions to ascertain the legal position. Quite the contrary - our common desire should be to avoid any unfortunate confrontations. We have every reason to believe that governments, the AUCC and universities individually are prepared to be fair and flexible in considering both general policy and specific agreements to govern this new area.

Accordingly, while it is appropriate to be aware of the uncertain legal position (and, indeed, to point it out to university administrations lest they make unfounded assumptions about their rights), it is very important that the CAUT agree upon and announce a reasonable and carefully thought-out statement of policy. Such a statement, if not accepted entirely, should at the very least form a sound basis for discussion and agreement in substantially the terms stated.

Excellent work has already been done in this area by our colleagues in the United States. What follows is a draft statement based largely on the policy statements of the University of Wisconsin and the American Association of University Professors t whom we must acknowledge a sincere debt of gratitude.

STATEMENT OF PRINCIPLES IN REGARD TO THE USE OF RECORDED INSTRUCTIONAL MATERIALS IN UNIVERSITY TEACHING

1. The faculty should have the primary responsibility for determining the educational and instructional policies of the university governing recorded instructional materials (interpreted here to mean original films and slides and electronically produced materials recorded on video tape, audio tape, and similar devices).

2. The preparation of recorded materials requires the utilization of university resources and facilities, of extremely complex and expensive apparatus and of technical experts who are not teachers. Educational television thus becomes the legitimate responsibility of the governing boards, the administration, and the teaching faculty. A committee representative of each of the three groups, a majority of whose members should be drawn from the faculty, should be responsible for setting institutional policy and practice, and for determining the rights and responsibilities of the parties involved. The rules governing recorded materials should be approved by the faculty, officially adopted by the appropriate authority, and published.

3. Responsibility for the scope and content of the curriculum belongs primarily to the teaching faculty. Recorded materials are but one method of presenting a part of any particular course. Accordingly, the departmental faculty should have the primary responsibility for the content and decision as to appropriate use of recorded materials in its courses. Departmental decisions should conform to the institutional policies referred to in paragraph 2.

4. A teacher or researcher engaged in the preparation or use of recorded materials is entitled to the basic academic freedoms common to all members of the academic community. More particularly, a faculty member

should have the same full responsibility for the selection and presentation of materials and of points of views in courses offered by recorded materials as he has in those given by traditional means. A departmental faculty should have this responsibility for courses developed jointly by its members.

5. A faculty member should not be required to participate in any phase of the development, preparation or presentation of recorded materials without his prior written consent. Refusal to participate in such a program should in no way affect his present or future status as a faculty member. A faculty member may be required to participate in such a program if the requirement is made a condition of his appointment.

6. A recording of a course presentation in the traditional manner should not be made without the prior written consent of the instructor involved who should be informed of the nature and purpose of the recording.

7. Adequate time should be provided for faculty members who are engaged in the development, preparation, presentation or administration of audio-visual courses. The time allowed must be consonant with competent teaching and a reasonable total load. The initial development of a television course might well constitute a full teaching load.

8. The individual faculty member (s) involved, and, when appropriate the department, should have control over the future use and distribution of the recorded material. Periodic reviews of the material should be made by the faculty member(s) involved to determine whether, in their unrestricted discretion, it should be revised or withdrawn.

9. A recorded program is an academic document and should bear the name of its author, his institutional affiliation, the date when it was recorded, and appropriate acknowledgements.

10. The university and the faculty members involved have a joint proprietary right in any recordings made. The statement of institutional policy referred to in paragraph two, should articulate this joint interest. If either party wishes to use the recording in other than its normal place in the curriculum, he should obtain written agreement from the other party. If such use involves the payment of fees or royalties, the distribution of such payment should be determined by written agreement between the parties. An appropriate use of a portion of such funds would be to provide adequate financial support for the development of educational television and research into its effects, within the institution.

11. In the event that a faculty member who has made a recording leaves the employment of the institution at which the recording was made, he should have the right, upon adequate notice, to withdraw the use of his

recordings. If he gives written permission, the department involved may use the recording at its discretion. If the faculty member dies while still employed, the recordings should not be used beyond a stipulated time (two years).

12. The extensive use of recorded materials in university education is largely an uncharted area in terms of its application and effects. Continuing research should be conducted by each university involved to determine the effects of television courses on the students' learning, on the conditions of teaching, and on the academic community in general. It is imperative that students be consulted as to the use of recorded materials within a department, that adequate participation of the student in his education be ensured, and that contacts between students and teachers be provided.

Stanley M. Beck
Daniel A. Soberman
Faculty of Law
Queen's University

December 1966.

APPENDIX A

COPYRIGHT AND THE UNIVERSITY LECTURE

The legal position on this subject is more easily understood if it is examined in two periods:

1. The period up to 1923, when the present Canadian Copyright Act was passed;
2. From 1923 on.

PRIOR TO 1923

I. At common Law

A. Unpublished works

The author of any unpublished literary work (including a lecture) had a proprietary right at common law in his work. This entitled him to withhold publication and restrain others from publishing.

B. Published works

The question of whether an author had a common law copyright after publication was for a long time keenly argued and the matter never seems to have been properly settled by the courts. If such a right did exist, it is clear that it became merged in the statutory right conferred by the Statute of Anne, the first Copyright Act, enacted in 1709.

II. By Statute

A. Unpublished works

In Canada, until 1923, there was no statutory copyright in unpublished works.

B. Published works

By a succession of statutes, a right was created by which authors were given the exclusive right to make copies of their works after publication. (It should be added that, as noted above, if a common law copyright existed with respect to published works, it is clear that the statutory right replaced it).

The position after 1709 was, therefore:

1. There existed at common law a proprietary right in unpublished works; and

2. There existed by statute an exclusive right to reproduce published works.

This was the situation in Canada until 1923.

Lectures

A private lecture (providing it amounted to a literary work) conferred on the lecturer the proprietary right referred to above.

A public lecture, on the other hand, did not confer on the lecturer a copyright by statute, which only gave protection to written publications.

Consequently, a lecturer, whose lecture had hitherto remained unpublished, lost his protection once the lecture was given in public. (The giving of a lecture in public amounted to publication).

Should the lecturer have his lectures published in written form, after he had delivered them in public, he did not gain the protection of the Act as the lectures were already in the public domain.

However, if he published the lectures in written form before he delivered them in public, he would get the benefit of the copyright statutes.

It was held by the House of Lords in 1887 that lectures given by a professor at a university to his students was not a public lecture and, consequently, that he had the common law proprietary right in his lectures and could prevent their unauthorized reproduction. In the case it was argued that the lectures should be regarded as having been given in public since the university was supported by public funds and that the lectures were open to all students who had the necessary qualifications. The House of Lords (with a strong dissenting judgment) did not accept this argument.

It is clear then that the usual university lecture given by a professor to his students did not amount to publication at common law and the professor had a proprietary common law right in those lectures by which he could restrain unauthorized reproduction. This would have been the case in Canada until 1923.

1923 AND AFTER

The Canadian Parliament passed what is the present Copyright Act in 1923, modelling the statute after the English Act of 1911.

The 1923 enactment altered the position outlined above in two important respects:

1. For the first time, statutory protection was given to unpublished literary works; and

2. The giving of a lecture in public was no longer to amount to publication.

The new statutory copyright in unpublished works replaced the proprietary right which existed in such works at common law.

Consequently, since 1923, the university teacher has had a statutory copyright in his lecture.

The Term

The term for which such copyright subsists depends on whether the lectures are published in the teacher's lifetime or afterwards, or not at all. If they were published in his lifetime (and such publication would, of course, have to be in written form), then the term would be for the teacher's lifetime and a period of fifty years. If the lectures were published after his death, and had never been delivered publicly, then the term would be for a period of fifty years from the date of publication. However, most university lectures will not have been published and, accordingly, the copyright in these will continue indefinitely.

The Nature of a Copyrightable Lecture

For there to be copyright in a lecture, it must amount to a "literary work". To be a "literary work", it must be expressed in print or in writing. According to Copinger and Skone James, it appears that "there is still no copyright in a mere extempore speech". The learned authors submit, however, 'that where a speech is made from notes it might be held that anyone copying the speech was infringing the copyright in the notes".

It should be remembered that it is not the idea or opinion of the author that is the subject matter of the copyright. It is the form in which the ideas or opinions are expressed. It is the manner in which the words are put together that matters.

The work must be original: this means that there must be original skill and labour employed in producing the particular form in which the work is expressed, although the expression of thought itself does not have to be original in form. It must not, of course, be copied from another work.

Thus, if two identical but independently-produced literary works were composed, the author who composed or published first could not restrain the other author from publishing. Both authors would be

entitled to copyright protection against third persons.

(This is unlike patent law, under which the inventor who obtains a patent for his invention acquires a right by which he can prevent another from using his invention, even though that other person had discovered the invention as a result of independent work).

Copyright Ownership: in the Lecturer or the University?

Usually the author of a work is the initial owner of the copyright.

However, section 12 (3) of the Copyright Act provides, in part:

> "Where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright ...."

Does this section mean that copyright in a lecture is owned by the university rather than the teacher?

The section raises two main legal issues:

1. Is the teacher in the employment of the university under a contract of service? (Presumably if the teacher was, it would follow that the lecture was given in the course of his employment by the university).

2. In the event that the answer to the first question is in the affirmative, is there an implied agreement between the teacher and the university that the copyright in his lectures shall not be owned by the latter but by the teacher?

As to the first of these issues, there are two related questions:

(a) Is the teacher in the employment of the university?

(b) If he is in the employment of the university, is he under a contract of service?

It might be thought that if a person is in the employment of another, it would follow that he is under a contract of service.

However, the first question to be settled is whether the university teacher is in the employment of his university. The position can be taken that the relationship between the teacher and the university is not that of employee and employer. The university, it can be said, is a community of scholars and the individual teacher is a part of that community. Whether or not our courts would accept this position in the light of present-day university operations is doubtful. Nevertheless, it is an arguable matter.

Of course, if it was established that an employment relationship did not exist, section 12 (3) of the Copyright Act would not be applicable and copyright would clearly be with the university teacher.

Assuming that the employment relationship was found to exist, does it follow that the teacher is under a contract of service?

Here, a distinction must be drawn between a "contract of service" and a "contract for services". This distinction depends upon the degree of control exercised by the employer. It has been summed up in this way:

> "The greater the amount of direct control exercised over the person rendering the services by the person contracting for them, the stronger the ground for holding it to be a contract of service; and, similarly, the greater the degree of independence of such control, the greater the probability that the services rendered are of the nature of professional services, and that the contract is not one of service".

And

> "Was he employed upon terms that he should, within the scope of his employment, obey his master's orders, or was he employed to exercise his skill and achieve an indicated result in such manner as, in his judgment, was most likely to ensure success?"

This distinction developed in the law of agency in connection with the problem of the responsibility of principals for the actions of their agents and servants.

Although normally an employee is under a contract of service, i.e. he is a servant of the employer, it is conceivable that there may be occasions where a person is employed under a contract for services. These occasions would occur when the employee is not subject to the necessary degree of control by the employer. It can be argued that at least some professional persons who are full-time employees

are not subject to that control. For example, could a company doctor be told what techniques to use in carrying out his work for the company?.

The courts might experience some difficulty in applying the distinction to the relationship which exists between the university and its teachers. To some extent the teacher is under the direction of the university, e.g., as to what courses he will teach and when the course should be taught. On the other hand, is it not accepted that the university must leave the teacher to teach his courses as he sees fit? Surely, this is what is meant by academic freedom. But the courts have not yet had the occesion to declare themselves on this question. No doubt the academic community would hope the courts would recognize what is customarily understood by academic freedom in the universities. However, the courts might not be prepared to come to such a conclusion which would have the effect of differentiating the position of the university teacher from that of teachers generally. For example, the high school teacher, whose teaching is more regimented, would very likely be said to be under a contract of service. In any event the relevant questions are whether or not the university teacher is a professional person, like the doctor, not subject to direction from his employer as to how he carries out his assigned work, and, if he is such a professional person, whether this means that he is under a contract for services rather than a contract of service.

The second main issue, it will be recalled, was whether there is an agreement between the teacher and the university that copyright should be in the former. (This issue, of course, does not arise if section 12 (3) of the Copyright Act does not apply for any of the reasons indicated above).

Clearly, it is not university practice to have express agreements of this kind and, if such agreements do exist, they must be regarded as arising by implication. No university would seriously suggest that it owns the copyright in books and articles written by a university teacher on the subjects which he teaches and which the teacher might well be said to have produced in the course of his employment. Should lectures be treated differently from articles or books? Is it conceivable that a university could take the legal position that it had the right, for example, to mimeograph a teacher's lectures and distribute those lectures as it sees fit? Is it not understood and accepted by universities, as a matter of custom, that copyright in lectures is in the teacher and not the university? This is yet another question which has not been settled by the courts but, should the courts be faced with it, there would be a fair chance of their finding in favour of the teacher.

Distributed for The Ontario Television Council,
137 Wilcox Hall, McMaster University,
Hamilton, Ontario.

Extract from *Test Pattern*. Instructional Television at Scarborough College, University of Toronto, Univ. of Toronto Press 1971 (for John A. Lee).

APPENDIX 1
Legal Rights and Videotape

The question of the legal rights of the professor and the college relevant to videotaped lectures and programs has been a controversial one since the college's inception. However, as already suggested in chapter 2, legal questions as such are not at the root of the problem.

This view has been taken for several reasons. First, most academics are not particularly avaricious nor are they known for sharp business dealings. When a professor writes a book, publishes an article, or delivers an address, the royalty, fee, or honorarium involved is rarely large, nor is it one of his foremost concerns. As one faculty member put it, the income from his publications is 'pin money.' The motivation to engage in research and publication in the first place is generally interest in the subject matter combined with an ambition for renown and prestige, not wealth.

Thus any questions of legal rights which have been pursued by Scarborough faculty members have tended to be raised from concern, not for direct compensation, but rather for job security. Academics are extremely conscious of job security, and have in tenure one of the oldest forms of this occupational benefit, which for most of the general public is a relatively new gain due largely to trade unionism. Videotaped lectures appear as a threat to the professor's job security because, with a relatively unskilled live substitute (the instructor or teaching assistant) and a series of taped lectures, a course can go on functioning in the absence of the producing professor.

Even more threatening is the possibility that a professor will not be effective on videotape, and will be replaced on the screen by a professor who performs well. The alleged advantage of instructional television – that it can bring the best lecturers to more students – is hardly considered an advantage by the majority of professors who know they will not be among the fortunate best.

These two possibilities are seen as undermining the professor's bargaining position with the college. University teachers have an outmoded and complicated method of finding and changing jobs in any case.[1] Much depends on word of mouth, a lucky break, a contact, and some astute but subtle bargain-

1/See. T. Caplow, *The Academic Market Place* (New York: Doubleday, 1963)

Extract from Ted Hutton, Instructional Television at Scarborough College, University of Toronto, Univ. of Toronto Press 1971 (pp. [illegible]).

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1/See. T. Caplow, *The Academic Market Place* (New York: Doubleday, 1963)

ing. When teachers are in good supply, as they are at present in most disciplines, making a move from one position to another can be an exercise in delicate brinkmanship.

The basic method of self-advancement is that of getting a better offer elsewhere. Then this offer is taken to your superiors with the implication that, unless it is at least matched, the offer will be accepted. It is very unwise to proceed without a solid offer, for college administrations and department chairmen are not easily bluffed. The implied threat of departure is effective only if it is likely that the college or department will have difficulty in replacing the professor concerned, and will need to do so to meet its curriculum commitments.

If the college can make ends meet and bide its time for a year by replaying a series of lecture tapes made by the professor, its advantages in the bargaining game are greatly enhanced. Little wonder, then, that the professors whose bargaining position is often weak, especially among the junior faculty (which means most of those at Scarborough), are unwilling to hand this trump card to the college administration.

The other major problem involved in legal rights is that of traditional territoriality of the classroom, noted in chapter 2. Television makes this territoriality almost meaningless by its very nature as a *broadcast* medium. Closed circuit television may be a technical reality, but it is something of a social fiction. Too many people are involved in the production of the tapes and there are too many possible opportunities for viewing them for closed circuit controls on videotapes to be regarded as anything more than a very leaky net.

Of course territoriality itself, in its traditional form, is a social fiction, but it is one everyone has agreed to observe for a long time and one which is easily enforced *in person*. It is suspended under certain specifically defined conditions: when a public lecture is announced, when material is put into print (*not* handwriting, in most cases), or when a professor makes it known that he doesn't mind a certain category of people dropping in on his lectures, such as students 'shopping around' during the first few weeks of session.

Beyond these specific exceptions, the professor considers his classroom something of a sacred precinct. When members of a student union not enrolled in the course want to invade it in order to hold a teacher evaluation, he is likely to resist. If *The Varsity* reports news of events in his class, he burns with resentment. If a colleague or administrator were to sit in without advance clearance, an almost unheard-of intrusion, he would be filled with a mixture of anger and amusement, and would certainly protest.

Imagine, then, the reaction of Scarborough faculty members when they learned by word of mouth that lecture tapes they had made in the television studios were being cut, collaged, and broadcast abroad at conferences and conventions! (chapter 2) Scenes were lifted out of context, careful lines of reasoning chopped up, all for the sake of 'boob tube' production.

It is only against the background of concern for job security, effective bargaining power for advancement, and classroom territoriality that discussion of the legal rights relevant to videotaped programs in the college may be understood.

In May 1966, the college promulgated an agreement setting forth the rights and obligations of the college and of professors in the use of television. The agreement in its entirety follows this introduction.

As previously indicated, the Television Committee set up in the agreement did not function effectively. Items 1-6 and 1-7 were repeatedly violated, as must inevitably be the case with a medium like television. The result has been a day-to-day working arrangement by which the television staff are familiar with what controls various professors desire, and handle some professors much more gingerly than others.

Adjustments under item 1-10 were made only for two clear-cut cases of tapes being replayed after the departure of the producing professor. No professor was compensated simply because he exceeded the factor of three (item 11-4) on which the system was based; yet, as already indicated, a desire to produce effective instructional television would frequently compel the professor to exceed this factor.

Formal documents were rarely signed when programs were actually produced in the studios, and most of the television teachers interviewed could hardly recollect what terms or understandings they had originally begun to work under. They were vaguely of the impression that they had the right to limit viewing of the tapes, to erase after three years or receive compensation, and had the obligation to permit the college to use the tape for three years, which, in every case but one, it had already done. No special compensation has been made for teachers whose tapes are now going into their fourth year of replay, other than the fact that they continue to reap the benefit of not having to lecture live.

AN AGREEMENT

Setting forth the Rights and Obligations of the College and of Professors in the use of Television at Scarborough College in the University of Toronto

May 13, 1966

PREAMBLE

The AGREEMENT which follows is novel in many respects. This Preamble is designed to assist the reader in understanding its form and purposes and, in particular, to explain some of the interests of a Professor, of a College in the University of Toronto, and of the University itself. However, the Preamble is explanatory only; it does not constitute a part of the AGREEMENT.

The College recognizes that not only its professors, but also its television production staff, give talent and salaried time when closed circuit television is used for teaching. Nevertheless, unusual questions of legal and administrative relationships arise only in the case of professors. The television production staff is employed for the specific purpose of using television as a means of better teaching and of dealing with large numbers of students. While the creative talents of television staff are invaluable in achieving these aims, they are no more so than the services and inventiveness of laboratory technicians have traditionally been in the development of scientific research and teaching methods. Producers, artists, and technicians accept appointment in the University because they wish to carry out these specific tasks. It is not the same with professors. It will rarely be the case that a professor is employed solely to teach by television. In almost all cases professors will have research and teaching responsibilities to which the use of television is not immediately relevant. Moreover, university teaching is already conducted according to various well-established traditions in which television has had no place. The introduction of teaching by television cannot be expected to create the existing relationships between university teachers and students, among teachers, and between teachers and university administrators. Although it is argued by some that the use of television creates completely new problems and opportunities, professors regard this assertion with suspicion, seeing it as the possible beginning of an attempt by administrators and politicians to reduce professors' rights and responsibilities as university teachers.

It has been asserted that 'the medium is the message,' but it must be the concern of the College so to control the medium that the message is what the professor wants it to be. Thus the College's interest must surely be to ensure that the use of television puts chairmen of departments, deans, other faculty members, and university administrators in a relationship no different from that which has been worked out over many years of 'live' teaching in the University of Toronto. The fact that a lecture is recorded on video tape, and can be inspected in privacy if desired by other persons than the students for whom it was intended, must not be allowed to justify any diminution of the professor's present control of the use of his own intellect. After all, there are many devices, apart from television, which make eavesdropping easy, but it is not acceptable that the existence of miniature microphones and tape recorders should be held to justify their use to monitor what professors are saying in lectures. The administrative and legal arrangements proposed in this document are designed to secure the professor's position, therefore, since it is a vital part of the College's interest to do so.

At the same time, the College cannot lose sight of the fact that the University of Toronto, with the support of the Province of Ontario, has financed the television installation in the College, and provides funds for its operation. The University may be expected to be interested in the possibility of widening the use of video tapes which the College makes for its own teaching. Closed

circuit television systems for schools or for Community Colleges might well be thought by the University to be suitable users of tapes produced at Scarborough College. It must be regarded as part of the College's interest that such use be facilitated. It might be argued, moreover, that since public money has gone into the recording of lectures and demonstrations, these should, where appropriate, be made available for broadcasting by educational television stations, or even over public networks, to make extension courses and adult education more interesting and effective.

* * * *

It is convenient to divide the AGREEMENT into two parts, one providing for the General Administration that will govern the conduct of TV teaching in the College (both 'live' and on 'tapes') and the other setting forth the specific terms that will govern the production and use of tapes under those arrangements. However, as far as the use of tapes is concerned, the two parts constitute a single AGREEMENT; neither would stand without the other.

* * * *

In due course, no doubt, it will be desirable to cast an Agreement along these lines in more formal, legal language. However, there is much to be said for a preliminary experimental period during which experience can accumulate and comments can be taken into account. The College, being equipped with TV facilities, must start to use them: and therefore this text will form the basis of arrangements between it and those members of its staff who use these facilities. But it is not to be considered as final or immutable.

AGREEMENT

PART I GENERAL ADMINISTRATION

1 The Dean of the College (subject to the general authority of the Principal) will represent the College in matters falling under this AGREEMENT.

2 A Television Committee will be established to exercise the functions set out in this AGREEMENT. It will be made up of 6 members of the College Faculty, elected by the College Council and of the following members *ex officio*: The Principal, the Dean, the Assistant Dean, the Director of Extension and the Director of Educational Communications Systems. The Dean will be chairman. A vice-chairman will be elected by the Faculty committee members from amongst themselves.

3 Both the professor concerned and the Dean must agree before any preparations are made for direct television production or for recording any lecture or demonstration on video tape.

4 In considering which courses, lectures or demonstrations should be televised the Dean will seek the advice of the Television Committee.

5 The Dean will also consult with the Chairman of the relevant academic Department of the University (or of University College) on the general propriety of the use of television for specific purposes. The professor

concerned will be expected to participate in whatever discussions normally take place in his Department on courses to be taught and methods of dealing with them.

6 In his teaching by television the professor will be as free from interference as he now is in the lecture theatre.

7 If any person whatsoever (other than the students for whom the teaching is intended, the Director of Educational Communications Systems, and his staff) wishes to see a televised lecture or demonstration, whether 'live' or on tape, he should obtain written permission to do so from the professor concerned.

8 The students for whom the teaching is intended may request 'replays' of tapes, and such replays will be provided, as far as reasonably practicable, by the Director of Educational Communications Systems.

9 A professor who teaches by television (whether 'live' or on videotape recording) will not be expected to mark more examination papers than would normally be produced by a conventional class in the department concerned. He is to be given sufficient help to reduce the burden of essay marking, test correction, etc. to the level accepted in conventional teaching.

10 Adjustments in remuneration, leave and the balance of teaching load will be made if a professor spends more time in teaching by television (which, with preparation and recording, makes special demands on professors' time) than would normally be spent on conventional lectures, or if frequent use by the College of tapes which he has made necessitates his attending to course administration, seminars, etc. to an extent beyond the normal teaching load.

11 When the professor and the Dean have agreed that a video tape should be made, they will sign a specific agreement based on this document and covering the specific points set out in Part II.

PART II SPECIFIC ARRANGEMENTS RELATING TO VIDEO TAPES (OR CINESCOPES)

The specific agreement referred to in Part I Para 11 will:

1 state the original purpose for which the tape or series is to be made, the educational conditions under which it is to be used, and the audience for which it is originally intended (e.g. 'Closed circuit Series Zoology 100 1967/68, Scarborough College; 30 45-minute tapes etc., or Closed circuit Series Political Science 201 1968/69, Scarborough College; 52 45-minute tapes; discussion groups of 20 meeting fortnightly, one taken by the professor');

2 provide that the professor's specific consent be required before any tape is used for the first time in teaching or is withheld from such first use;

3 require the specific consent of the professor and of the Dean to any departure from the stated purpose, educational conditions or audience;

4 give the College the right, once the professor has approved first use, to use the tape for its own closed circuit television teaching for three years (subject to Para 8 below);

5 provide that the professor must be given reasonable notice of any use of the tape under Para 4, that he (and only he) shall be permitted to edit the tape from time to time during the three years, and that he may petition the Television Committee, whose decision shall be final, for permission to erase or to remake the tape;

6 give the College the right to erase the tape after first use, if it so wishes, unless the professor wishes to buy the tape under (8a) below;

7 provide for the College to use the tape after three years if it wishes, but only if the professor permits, such permission to be required annually while the professor remains on the College staff;

8 provide for the following possibilities when a professor who has made a tape leaves his employment with the College:

(a) that he may buy the tape from the College at a price to be agreed with the Dean or, if necessary, decided by the Television Committee;

(b) that, if then the professor leaves the College before first use of the tape as envisaged in its 'original purpose' (Part II, 1 above) the College may use the tape for one year, after which it shall be erased;

(c) that, if the professor leaves after first use but less than three years after the original taping, the College may use the tape for its original purpose, or for any purpose subsequently agreed under Part II 3, for one year after he leaves, after which the tape shall be erased;

(d) that, if the professor does not wish to exercise his rights under (a), or the College its rights under (b) and (c), the tape shall be erased forthwith.

9 give the College the right to sell or hire out the tape or series to public broadcasting systems at prices and for purposes to be determined by the Television Committee, save that no such use shall be made without the professor's approval, and that the provision for editing shall apply as in Para 5;

10 provide that where use is made of a tape or series under Para 9, the College shall pay the professor the appropriate University of Toronto honorarium;

11 give the College the right to make the tape or series available to closed circuit educational systems other than its own, at a charge to be decided by the Television Committee, save that no such use shall be made without the professor's approval, and that the provision for editing shall apply as in Para 5;

12 provide that in cases of use under Para 11 the Television Committee shall determine the appropriate fee.

Notes sur les droits d'auteur

NETA

Newsletter

Vol 3 / No 4 July 1963

Teachers' ety rights: a first statement

A committee of large city superintendents, meeting at the US National Education Association, has created a set of recommendations to govern the professional rights and responsibilities of TV teachers. The recommendations were summarized by Harold Wigren in the NEA's publication, Audio-visual Instruction. They have been circulated locally for consideration by NETA members. Here is Mr. Wigren's summary:

"Teachers assigned to teach on television should receive the same consideration regarding compensation and released time as other persons who have special assignments in the school program.

"Policies adopted by a school district in regard to TV teachers should be consistent with policies and practices in other phases of the instructional program.

"Any program developed by a TV teacher on school time becomes the property of the school district. If a program is re-used within a school district, the teacher should not be entitled to royalties. If, however, the program is used or re-used by other school districts, the teacher should share in whatever revenues are received therefrom.

"Teachers should be involved in the planning and negotiations of all matters pertaining and negotiations of all matters pertaining to their compensation and residuals. They should share in the making of all policies which will affect them personnally. Such matters are negotiable between teacher and school administration. The TV teacher should at all times remain under contract to the school district that employs him, and not to any other school or ETV agency, authority or institution.

"TV is a team technique. It is not just a teacher on camera. If the TV program is to be used extensively, it must involve many persons. However, there should be a differentiation of roles between members of the TV team and compensation should be determined accordingly."

Extrait de Au fil des événements, Université Laval, vol.6, no. 5, 8 octobre 1970, titre Droits d'auteurs en matière d'enregistrement pour l'enseignement télévisé.

[illegible] utilisés par le [illegible] de l'Université, indispensable aux exigences de la méthodologie moderne, a entraîné certains problèmes relatifs aux droits d'auteur touchant le matériel pédagogique utilisé pour l'enseignement télévisé. Le Conseil de l'Université Laval a confié l'étude de ces problèmes particuliers au Comité d'étude sur les brevets d'invention et les droits d'auteur. Ce comité consulta la réglementation adoptée en la matière par d'autres universités et institutions d'enseignement du pays et des Etats-Unis.

L'examen de ces documents révéla que les règlements concernant les enregistrements, pour l'enseignement télévisé, posaient des problèmes complexes tant par la variété des situations existantes que par les modalités des solutions apportées pour les résoudre. Conséquemment, le comité, adoptant une attitude conforme à la moyenne, s'est attaché à choisir, parmi les nombreuses réglementations proposées, les solutions les plus appropriées aux besoins spécifiques de l'Université Laval. Le projet de réglementation ainsi élaboré fut soumis le 12 mai dernier au Conseil de l'Université, qui, après l'avoir discuté et amendé à sa séance du 20 mai 1970, a demandé que la copie du texte final du projet ainsi modifié soit déposée au greffe de l'Université, sous la cote DCU-70-42. En voici la teneur :

Définition

Le terme « enregistrement » désigne ici tout matériel audio-visuel (bandes magnétoscopiques, films, clichés, disques, etc.) utilisé pour l'enseignement. Il ne comprend pas les livres et autres imprimés (v.g. notes de cours) rédigés par les professeurs.

Principes

1. Tout enregistrement audio-visuel conçu et réalisé aux frais de l'Université Laval par ses professeurs et des chargés d'enseignement dans l'exercice normal de leurs fonctions est la propriété de l'Université et sujet aux réserves suivantes :

2. L'auteur (ou les auteurs) d'un enregistrement en conservent la propriété intellectuelle, et possèdent un droit de regard sur son utilisation, tant à l'Université qu'à l'extérieur.

3. En vertu de ce droit l'Université est tenue d'obtenir, dans tous les cas, le consentement de l'auteur avant a) d'utiliser un enregistrement pour la première fois, b) de l'utiliser pour des fins ou dans des conditions autres (v.g. type d'auditoire) que celles pour lesquelles il a été conçu, c) de le corriger ou le modifier de quelque façon que ce soit, d) de le prêter, le louer ou le vendre à quiconque et enfin e) de l'effacer quand elle ne compte plus l'utiliser.

4. En cas de vente ou de location d'un enregistrement, l'auteur aura droit à une portion des revenus bruts. Cette portion est fixée par le Conseil exécutif.

5. L'auteur n'a droit à aucune rémunération supplémentaire pour l'utilisation de son œuvre à l'Université même.

6. Avant chaque nouvelle utilisation d'un enregistrement, l'auteur pourra le reviser, après entente avec l'Université, pourvu qu'il en fasse la demande en temps utile.

7. L'Université ne se reconnaît aucun droit et n'assume aucune responsabilité quant à un enregistrement fait à l'extérieur par un de ses professeurs.

8. Tout enregistrement [illegible] produit par un [illegible] ou [illegible] de l'Université (v.g. [illegible]) demeure la propriété de l'Université. Cependant, les conditions d'utilisation (prêt, location ou vente) feront dans chaque cas l'objet d'un contrat entre les parties intéressées.

9. L'auteur d'un enregistrement conserve son droit d'auteur tant qu'il est à l'emploi de l'Université. Ce droit ne peut être transféré ni transmis.

10. Lorsqu'il quitte l'Université, à la retraite ou avant, le professeur a l'option de se désister définitivement de son droit d'auteur ou d'offrir à l'Université soit de lui vendre, soit d'acquérir pour lui-même l'enregistrement. Advenant que l'Université juge cette offre inacceptable, elle pourra continuer à utiliser l'enregistrement pendant un (1) an encore, après quoi, elle devra soit le déposer aux archives, soit le détruire (i.e. l'effacer).

Pratique

1. L'administration des principes énoncés ci-haut relèvera du Conseil exécutif de l'Université.

2. En cas de désaccord entre l'auteur et le Conseil exécutif, le litige sera soumis à l'arbitrage d'un comité de trois membres composé du supérieur immédiat (directeur ou doyen) de l'auteur, et de deux professeurs choisis, l'un par l'auteur, l'autre par le Conseil exécutif.

3. La décision de ce comité sera finale et sans appel.

Texte final du DCU-70-42 amendé par le Conseil de l'Université à sa séance du 20 mai 1970. Copie de ce projet est versée au greffe de l'Université.

U.Q. T. I
Rapport du groupe de travail sur la télé-université

3.2.3.3 *Les droits d'auteur*

C'est sous l'angle particulier de la participation par les universitaires à la création de matériel d'enseignement que se pose la question complexe des droits d'auteur.

A cet égard, MacKenzie distingue trois types de situation:

a) "Le matériel est préparé - moyennant rétribution - par un universitaire pour le compte d'un éditeur ou d'un organisme extérieur à l'université ou à l'établissement universitaire. Dans ce cas, le droit d'auteur appartient évidemment à l'universitaire, et celui-ci doit (bien que souvent il ne le fasse pas) négocier avec l'institution à laquelle il appartient, et lui offrir s'il utilise les installations ou autres moyens dont elle dispose, soit un paiement direct, soit une part de ses droits d'auteur.

b) Le matériel est préparé par un universitaire dans le cadre de son enseignement sans qu'il s'impose un travail supplémentaire en dehors de son activité professionnelle normale. Dans ce cas, le droit d'auteur devrait sans doute appartenir à l'établissement où il enseigne qui est libre de ristourner ou non - à son gré - une part des droits d'auteur à l'universitaire en question.

c) L'universitaire crée ce matériel en partie ou en totalité au prix d'un travail supplémentaire qu'il s'impose en dehors de son service normal. Dans ce cas, le droit d'auteur devrait être partagé entre l'institution universitaire et le professeur (par moitié, semble-t-il). C'est ainsi que procèdent un certain nombre d'universités américaines" (19).

(19) N. MacKenzie et al. Op. cit. P. 202.

Dans le projet PIRAMES, un croisement des types a) et b) a été utilisé.

En attendant une étude complète de cette question telle qu'elle se pose dans l'Université du Québec, nous conclurons avec cet autre passage qui nous semble significatif:

> "Le but principal de l'institution universitaire dans ses efforts pour fournir les moyens nécessaires à la production de matériel d'enseignement est d'améliorer l'enseignement et de faciliter l'acquisition des connaissances. Une trop grande âpreté à défendre son droit d'auteur pourrait fort bien paralyser le processus qu'elle espère favoriser. Si l'espoir de toucher des droits d'auteur ou quelque autre stimulant doit encourager les professeurs à essayer de produire leur propre matériel d'enseignement, en quantités inconnues jusqu'à ce jour, il convient alors de considérer cela comme un élément d'une stratégie de l'innovation, faute de quoi les progrès seront minimes" (20).

(20) N. MacKenzie et al. Op. cit. P. 203.

4- Droits de l'Université et de chacun des membres de l'équipe

4.1 Le paiement de la somme ou des sommes fixées aux articles 3.2 et 3.3, compte tenu de l'article 12 paragraphe 3 de la loi concernant le droit d'auteur (S.R.C. ch. 55) a pour effet d'investir l'Université à perpétuité de tous les droits d'auteurs afférant à la production audio-visuelle, au texte de référence et aux documents d'accompagnement, sans limitation de fins ou de moyens.

4.2 L'Université s'engage à respecter et à protéger l'intégrité physique et pédagogique de la production audio-visuelle, du texte de référence et des documents d'accompagnement. Une utilisation partielle ou de façon divisible de la production audio-visuelle, du texte de référence ou des documents d'accompagnement ne constitue pas cependant une atteinte à l'intégrité physique ou pédagogique.

4.3 L'Université s'engage à faire mention des services professionnels des membres de l'équipe de professeurs dans la production audio-visuelle, dans le texte de référence et dans les documents d'accompagnement: cette mention doit préciser, dans le texte de référence et dans les documents d'accompagnement, qu'il s'agit d'un cours inscrit dans un programme universitaire.

EXTRAIT DU CONTRAT ENTRE LES PROFESSEURS ET L'U.Q. POUR "PERMAHA".

.../6

DRAFT

POLICY OF MICHIGAN STATE UNIVERSITY CONCERNING RIGHTS IN AND ADMINISTRATION OF COMMUNICATION MATERIALS DEVELOPED WITH ITS RESOURCES BY ITS FACULTY AND STAFF FOR ITS EDUCATIONAL AND CULTURAL PURPOSES

Administration of Policy

Administration of this policy and of all matters pertaining to copyrights shall be vested in a person appointed by the President of the University and designated as Administrator of Copyrights. This administrator shall have access to a faculty committee for advice on interpretation and revision of policy. He shall make an annual report of his activities to the President.

Ownership

All communication materials, whether audio recorded, printed, or in other visible form, which are developed for the educational and cultural purposes of Michigan State University by its faculty and staff members pursuant to their assigned duties and utilizing University funds or funds under the administration or control of the University shall belong to the University. The ownership applies both to instructional materials and those for information and cultural purposes such as may be distributed to the general public.

University ownership rights shall be in perpetuity, including the right to re-use the materials, subject to the reservations cited in this statement. The University may sell, dispose of, lease, or exchange the materials with the concurrence of the principal faculty or staff member or members involved. It may copyright materials in its name, but this

shall not affect an employee's right to make other uses of ingredients which were prepared by him not solely for the copyrighted materials.

Specific agreements may be negotiated with sponsoring organizations regarding ownership rights in materials developed under grants or contracts.

MATERIALS DEVELOPED BY AN INDIVIDUAL FACULTY MEMBER

The following policies apply to materials developed principally by an individual faculty member (hereinafter called "instructor") on assignment by his department:

Initial Authorization to Use Material

The University will not use newly developed materials until the instructor has approved their content and format and released them in writing.

Duration of Use

For three years after termination of the instructor's appointment, the University retains ownership of the materials and may continue to use them if the department for which they were made considers them still valid. To use them thereafter, the University must negotiate a contract with the instructor or with his estate.

Revision

The University may use and re-use the materials for any of its own purposes. The materials should be revised periodically, however,

in order to be kept current and to improve the effectiveness of the presentation. The extent, nature, and frequency of revision are matters for departmental determination, in which the professional judgment of the instructor who developed the materials should be given due consideration. If the extent and cost of revision exceed available resources, the department may discontinue using the materials.

Compensation and Released Time

The time provided an instructor for preparing and presenting the materials shall be sufficient for competently performing his task.

Ordinarily, the time released for this purpose is to arranged in such a way as not to warrant additional compensation. When the assignment must constitute an overload, compensation shall conform to a uniform University policy.

The preparation and presentation of the materials shall merit consideration equal to that of other professional contributions in assessing the instructor's qualifications for tenure, promotion, and for increase of salary.

If the University receives net income from marketing materials, a portion of that income may be assigned to the principal participants in the development of the materials on approval of the Administrator of Copyrights and the Provost's Office. In the instance of multiple developers, the assignment should be proportioned equitably among them.

CONTINGENCIES

Any contingencies not covered by this policy statement will be resolved by the Administrator of Copyrights, with the advice of the faculty committee, after full consideration of the factors concerned.

Policies Concerning University-Sponsored
Publications, Television and Other Recorded Materials
(University of Illinois)

Copyrights and Recordings

Sec. 19. (a) The right to copyright a work or to assign this right to a publisher normally belongs to the author of the work. However, when the author is specifically commissioned by the University or one of its departments to prepare a manuscript or report, the manuscript and all rights to it shall belong to the University.

(b) Research and service pamphlets and bulletins may or may not be copyrighted, at the discretion of the department issuing the work.

(c) Books published by the University Press are copyrighted as provided in Section 10.

(d) All rights in recordings of lectures, of demonstrations and of other content -- such as films and videotapes -- that have been produced with the use of University facilities, resources or financial support shall belong to the University.

(e) If the University uses or markets copyrighted or recorded material produced by a staff member under the conditions outlined in the second sentence of (a) and in (d), and if such disposition is made on a basis that yields a net income to the University, a proportion of the net income may be assigned to the author (s) or developer (s) of the material.

(f) A University Committee on Copyrights and Recordings, appointed by the President, will review the circumstances involved in each case that might arise under the principle stated in (e), and make recommendation concerning it to the President and Board of Trustees. It is expected that the Committee will be guided in its recommendations by standards analogous to those stated in Section 18 (c) (p. 60) concerning patents.

Televised Instruction

1. Released Time for the preparation of television course materials. It usually requires more time to prepare a course for television presentation than for conventional presentation. Arrangements should be made within the department to provide such time as is needed -- the amount varying with the nature of the course materials and the amount of television time involved. The need for released time should be taken into account in determining the teaching load of the instructor involved. If additional funds are required to supplement or to replace the instructor's time during the preparation of television materials, and if funds are not available within the departmental budget, a request for a special appropriation should be made.

2. Instructional autonomy. Colleges, departments and faculty members have the same degree of autonomy and responsibility with respect to televised instruction, including recordings, as they have concerning any other type of instruction.

3. Revision of recorded materials. Recorded instruction should be revised periodically in order to be kept current and to improve the effectiveness of the presentation. The extent, nature and frequency of revision are matters for departmental determination, in which the professional judgment of the instructors directly involved should be given due consideration. If it happens that the extent and cost of such revisions exceed the resources of the department or of the University, departments are free to discontinue use of the recordings in question.

4. Compensation to individual faculty members. The release of time given to the instructor for the preparation and presentation of televised instruction ordinarily will be such that no additional direct compensation would be in order. It should be recognized, however, that superior teaching by television involves a high degree of professional competence and scholarly attainment, and such performance should be appropriately recognized in the assessment of the instructor's qualifications for promotion and salary increases.

Section 19 (a) and (f) of The General Rules Concerning University Organization and Procedure state the conditions and procedures whereby a faculty member who develops television materials might share in any net income derived from the marketing of those materials.

If an instructor's association with a course for which he has developed televised materials is terminated -- by change of assignment, resignation, leave, death, or any other reason -- the recorded material may be used within the University without additional compensation for a period not to exceed three years. Beyond that time, the instructor will be eligible for additional compensation under the conditions and procedures outlined in Section 19 (a) (f).

5. Off-campus use of recordings. No recorded instructional materials will be released for use on another campus of the University, or by individuals or institutions outside the University, without prior consent of the department and the instructor concerned.

If an instructor who has developed recorded course materials leaves the University, the conditions and terms under which copies of his recorded materials might be obtained for his own use would be determined in the light of recommendations by the University Committee on Instructional Television and Broadcasting (through a subcommittee on recorded instruction) and after review by the University Committee on Copyrights and Recordings.

6. Erasure of recordings. No recordings will be erased without the consent of the department. While the instructor concerned remains actively associated with a course, his approval would be sought before the erasure of his recordings for that course.

7. Grants and contracts for the development of instructional recordings. By agreement with the departments and faculty members concerned, the University may accept grants or contracts for developing programs or courses for regional or national distribution. These programs

might include recordings to be broadcast to the general public or those for use in formal instruction. The regular administrative procedures of the University concerning grants and contracts would prevail in such cases, and specific agreements would be negotiated with the sponsoring organizations concerning budgets, ownership rights in the recorded materials, and royalty arrangements. Faculty members engaged in such projects would be granted releases of time appropriate to the portions of their salaries paid from the project budgets. When circumstances warranted it, special royalty agreements would be negotiated with individual faculty members in accordance with Section 19 of The General Rules Concerning University Organization and Procedure.

UNIVERSITY OF WISCONSIN (MADISON CAMPUS) FACULTY DOCUMENT 42 -
January 13, 1966

REPORT OF THE UNIVERSITY RADIO - TELEVISION COMMITTEE

POLICIES CONCERNING UNIVERSITY DEVELOPMENT AND USE OF RECORDED INSTRUCTIONAL MATERIALS

1.

A. As the faculty of the University, utilizing University resources and facilities, creates and makes use of recorded instructional materials, problems arise concerning the rights and responsibilities of the University, of the several colleges and departments, and of the individual faculty members involved in the preparation, ownership, and use of these materials.

B. Recorded instructional materials are here interpreted to mean original films and slides and electronically produced materials recorded on video tape, audio tape, and similar devices.

2.

A. The faculty of the University is encouraged to experiment with new media in teaching and to attempt to improve both instructional efficiency and instructional quality.

B. The faculty should have primary responsibility for determining the educational and instructional policies of the University governing recorded instruction.

3.

A. The conditions involving the use of recorded instruction should in no way change the basic academic freedoms to which any faculty member is entitled.

B. A member of the faculty should not be expected to participate in the development of recorded instruction unless he consents in advance to such participation.

4.

The faculty member, and, when appropriate, the department will determine the extent and the manner in which recorded instruction will be used in courses offered in resident instruction.

5.

A. A faculty member may apply to the appropriate administrative agencies for a grant-in-aid to provide reduced teaching load and to obtain technical facilities for the making of recorded instruction (either new or revised) for his course. The time and effort required for the initial planning of recorded instruction should be recognized when providing the faculty member with a reduced load. The amount of reduced load requested during the period of making the recordings will be determined by the extent and type of development required and the estimated time needed for completion of the project.

B. The faculty member teaching a course has the same responsibility for the selection and presentation of materials and of points of view in the recorded material as he has when he teaches it in the traditional manner. The same is true when a series of recorded demonstrations is prepared by a group of faculty members.

C. The faculty member is responsible for obtaining necessary clearances for non-original content materials of all kinds used in the recordings.

6.

A. When a department has given approval for the use of recorded instruction in a given course, it then becomes the prerogative of the faculty member teaching the course at a given time to decide whether or how to use any available recordings to best educational advantage. Using the usual methods of assigning teachers to courses, the department would be expected to allow a teacher to benefit from having recorded certain materials by periodically assigning him to teach a course in which he can increase his efficiency and that of the department by using the recordings. The frequency of this assignment will be determined within the department on the basis of the variety of factors that ordinarily influence teaching assignments.

B. When a faculty member wishes to use recordings in a given course, the University should when practical provide him with the special facilities needed for transmitting, receiving, viewing, or listening as well as with the usual adjuncts of clerical assistance, library resources, etc., commonly made available.

7.

A. A complete unit of recorded instruction is an academic document. Hence, like any other scholarly work, it should bear the name of its author, its institutional affiliation, the date when it was recorded and appropriate acknowledgments.

B. Provisions should be made for control by the individual faculty member, and, when appropriate, by the department, over the future use and distribution of recorded instructional material and for its periodic review by the original teacher-author, or by an appropriate departmental faculty body to determine whether it should be revised or withdrawn from instructional use because of obsolescence.

C. The University and faculty member (s) making a recording share in the proprietary rights to the recording, each recognizing the other party' s rights in the use of the recording. Generally, the University's rights arise from its contribution of research and project assistants, and its furnishing of equipment and production facilities, the faculty member' s rights arise from his original contribution to the content of the recording. If either of the two parties plans a use of the recording within the University of Wisconsin system other than in the course or specific departmental curric 'um for which it was made, he will obtain written permission from the other party. (Departmental approval of such use may also be necessary or appropriate in certain instances). If either of the two parties plans a use of the recording outside the University system (e.g. rental to a publisher), the written agreement between the two parties should stipulate distribution of fees or royalties which may accrue. Because of the great variance in extent and manner of possible instructional usage of recordings (including variance in cost factors), an all-encompassing policy on copyright and fee distribution is not feasible, except one which recognizes the proprietary and traditional rights of both parties.

D. The faculty member who creates recorded instructional material has the prerogative of withdrawing or replacing the material in total or in part. When withdrawal of material jeopardizes or terminates a scheduled course, the faculty member shall notify the department of its withdrawal in the semester preceding withdrawal, thirty days prior to the date on which the department must submit timetable copy for the semester in which withdrawal will take place.

E. Should a faculty member who has recordings of his own materials deposited with the University for any reason leave the employment of the University, he can, with appropriate notice (see Sec. 7D) withdraw the use of these recordings. If he gives permission, the recordings may be used at the discretion of faculty members and departments involved. If neither a withdrawal nor a permission is executed (e.g., in the case of the death of the faculty member) the recordings may be used not beyond two years.

Departments which formulate statements of principles governing the use of recorded instruction within their departments should deposit a copy of the statement with the University Radio and Television Committee.

UNIVERSITY RADIO-TELEVISION COMMITTEE:

Henry L. Ahlgren, Chairman
James W. Cleary
Robert N. Dick
S. Watson Dunn
Frederick W. Heberman
Harald S. Naess (alternate on leave)
Ordean G. Ness (alternate)
Robert C. Pooley
Robert Taylor
Wilson B. Thiede

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DOCUMENTATION SUR LE DROIT D'AUTEUR

2

Dossier concernant le droit d'auteur et le travail du Conseil des Ministres de l'Education du Canada ainsi que la participation du Québec dans cette entreprise

Documents compilés par Robert Moore
S.G.M.E.

février 1973

DOCUMENTATION SUR LE DROIT D'AUTEUR

Dossier concernant le droit d'auteur et le travail du Conseil des ministres de l'Education du Canada ainsi que la participation du Québec dans cette entreprise.

1. Travaux préliminaires de M. R.A. Morton, Associate Director of Curriculum, Department of Education, Alberta.

   1.1 Rights as they relate to television in Education, a summary of background information, February 1969. (1)

   1.2 Copyright and Instructional Media in Canada. (2)

   1.3 The current Copyright Situation. (3)

2. Enquête de M. R.A. Morton, membre du Secrétariat du Conseil des Ministres de l'Education pour les fins du comité des Moyens d'Enseignement.

   2.1 En mars 1971, M. Morton entreprend de consulter diverses personnes dans toutes les provinces, au sujet de la révision de la loi du droit d'auteur. C'est le document intitulé "Possibles positions by Council of Ministers of Education". (4)

   2.2 A son tour, monsieur le sous-ministre Beauchemin demande l'avis de plusieurs personnes, au ministère, à Radio-Québec et au ministère des Affaires culturelles; il transmet sa réponse au cours du mois de mai 1971 au Secrétariat du Conseil des Ministres. Les réponses sont indiquées par des cercles sur le document-questionnaire envoyé par M. Morton.

   2.3 En juin 1971, M. R.A. Morton fait rapport et donne la synthèse des opinions recueillies. En même temps, il donne un bref rapport concernant le Rapport du Conseil économique du Canada de janvier 1971. D'où deux documents:

   Copyright and Education in Canada, R.A. Morton, June 1971 (5)

   Relationship of Positions outlined above to Report of Economic Council of Canada, R.A. Morton, June 1971 (6)

   Il faut ajouter au dossier un bref rapport de M. Morton au sujet du Rapport du Conseil économique, en date d'avril 1971:

.../2

Re: Report on Intellectual and Industrial Property, Economic Council of Canada, recently issued. (f)

3. Le document "A Position Paper for the Council of Ministers of Education, Canada". (g)

3.1 Ce document a été déposé devant le conseil des ministres de l'Education, à la réunion des 20, 21 septembre 1971.

3.2 M. Roland Marquette (planification) a présenté des remarques sur ce document dans une note intitulée "Les droits d'auteur et l'éducation". Note présentée le 15 septembre 1971. (h)

3.3 M. Claude Marin, le 10 novembre 1971, résume le dossier dans le "document no. 8". (i)

3.4 Monsieur Robert Moore reprend la question au niveau du S.G.M.E.

Robert Moore

RIGHTS AS THEY RELATE TO TELEVISION IN EDUCATION

(1)

R.A. Morton

A summary of background information -
February 1969

1. (a) An educational television program involves the participation of many individuals and agencies which have an interest in the finished product and how it may be distributed and used.

The educational agency - a Department of Education
- a school system
- an educational institution
- an association of educational agencies

Those employed by the educational agency
- a writer or writers who may also be a teacher
- a consultant or consultants who may also be a teacher
- a performer or performers who may also be a teacher
- various technical specialists when necessary e.g. photographers, graphic artists

Those employed by the production agency
- C.B.C.
- private station
- production agency owned by the educational agency
- private production agency from which facilities (and personnel) may be rented

Above personnel usually involves a producer, the technical and production staff including a studio crew, artists, photographers, staging personnel, clerical staff etc.

The content of the program consists of
- the basic concept, idea or purpose
- what is seen - performers, visuals, graphics etc.
- what is heard - script, music, sound effects

The content is paid for by the educational agency through
- fees paid directly to script writer
- fees paid directly to performer or teacher-performer
- fees paid, where applicable, to creators of visuals, graphics etc.
- fees paid, where applicable, to owners of music rights etc.

3.

Q A

The production costs are sometimes paid for by the production agency
- and as in the case of the CBC and some private stations not charged to the educational agency;
- or as in other cases, such as Ontario Educational Television Division, the production agency charges the educational agency for its services.

(b) An educational television program may be distributed and used in a variety of ways:

The program in the form of videotape may be broadcast on VHF channels, single station or network at a scheduled time.

The program in the form of videotape may be broadcast but at various times over various stations depending upon the local situation.

The program broadcast over regular VHF channels at a pre-determined time may be recorded "off-the-air" and played back to classrooms at more convenient times.

The program may be distributed to schools by cable or 2500mg, on schedule or on request depending on the type of facilities.

The program may be distributed as a videotape (in the same manner as a film) to schools and played back at appropriate times within the school on its own videotape equipment.

2. It would seem that the following 'rights' are involved:

   a. the rights of the educational agency, the employees of which (as employees) conceived the basic concept, idea or purpose, and which pays fees for scripts, performances and other services to individuals not in its regular employ
   b. the rights of the script writer and consultant
   c. the rights of the performer. At times the script writer and performer are the same person
   d. the rights of artists and musicians involved in the program
   e. the rights of copyright holders of any segments of materials used in the program
   f. the rights of the producing agency
   g. the rights of the creative and .echnical persons employed by the producing agency.

Many of the rights involved are protected collectively through various professional, artistic , technical etc. associations

SCRIPT WRITERS may be either ACTRA members, or members of a professional teachers' organization or both

PERFORMERS also may be either ACTRA members or members of a professional teachers' organization or both

ARTISTS AND MUSICIANS have their own organizations as do technical and other personnel

Generally employees of an agency, as employees, cannot claim a share in rights to programs produced by the agency which employs them.

3. The practices with regard to the use of educational television programs which seem to be regarded as desirable from an educational point of view include:

   a. receiving the program over the air in the classroom at the scheduled time
   b. recording the program as it is received over the air, whether a class is watching it or not, and being able to play it back a number of times to get around time tabling problems and to introduce the material at a time most critical for learning
   c. distributing theprogram over cable (or over 2500 mg) to classrooms at a scheduled time
   d. holding the program as part of a reservoir of educational television taped material which can be retrieved by teacher or student in whatever manner is most appropriate. The length of time during which storage would be permitted could be negotiated with the holders of relevant rights.

4. Most educators agree:

   a. Television material must be of the highest quality possible consistent with resources of talent, time and money
   b. Television material must be relevant from the point of view of its content and its handling of content to what is going on in the classroom. At the same time, television must provide educational experiences well beyond those possible under normal school conditions.
   c. There must be a sufficient quantity of television material to justify the installation of receivers and to justify the rescheduling of classroom time to take advantage of television programs
   d. While television material can be produced at every level of educational organization no single source can provide all the material needed. There must be opportunity for sharing and exchange of programs. Any recognition of rights in any educational television program should take into account these factors:

      1 All of the various parties which are involved in "ownership" of the "property"

ii The rights of those persons who, because of special skill and talent, contributed a substantial degree of originality or creativity to the program, should be protected against any attempt on the part of any person or group of persons from profiting from his creation

iii The rights of any member of the teaching profession who participates in any program should be recognized apart from #ii above

iv The rights of students to be able to enjoy and profit from television programs especially designed to provide rich educational experiences should also be protected

e. Negotiations which involve the purchase of rights should take into consideration:

i replay of material in various modes-broadcast, cable, 2500 mg., videotape etc.

ii replay of material in classroom by teacher or by individual student

iii reuse of material within jurisdiction of educational agency

iv reuse of material outside jurisdiction of educational agency - district, region, province, nation.

COPYRIGHT AND INSTRUCTIONAL MEDIA IN CANADA

1. A STATEMENT OF THE PROBLEM:

Instruction involves not only the knowledge, skill and ingenuity of the teacher, but also the products in various forms of the knowledge, skill and ingenuity of many other professional persons. Most of these products are in print form, but increasingly materials in other media are being employed by both teachers and students.

The purchase of these products usually gives the buyer the right to use them in a variety of ways as long and as often as required. The buyer may also place the product in a "library" from which it may be borrowed at different times by different teachers. The money paid by school authorities and others provides payment to the creators of the materials and at the same time provides the incentive for the creation of newer and hopefully better materials.

New copying techniques, principally xerography, photography, and electromagnetic recording have made it possible to reproduce in whole or in part, and in quantity, almost any material without payment being made to the creator or the owner of the material. These new techniques are being used by certain educational institutions in Canada now. The assumption is that because no one is profiting from the activity and because education is a worthy social endeavour, there can be no infringment of the rights of anyone. The problem is double-edged. On the one hand, teachers and students who are most intimately involved in the process of learning must have access to a wide ranging array of materials, in whatever form of presentation may be most effective and practical. Newer technology is capable of bringing these materials to instructors and students wherever they are. On the other hand, a way must be found to ensure a continuing source of useful and creative materials without enmeshing teachers in particular and educational authorities generally in a complex maze of unfair and unworkable regulations as well as confronting them with time-consuming and expensive procedures before materials can be used.

2. THE CONTEXT OF THE PROBLEM:

The rights of the owners of the intellectual and artistic properties and the rights of the public, the users of the properties, are generally articulated in copyright law both national and international. The Copyright Act of Canada has been in force since 1924. Revision of this Act is being studied both by the Economic Council of Canada and an Interdepartmental Committee on Copyright set up by the Minister of Consumer and Corporate Affairs.

Present Canadian Copyright Law:

The following summary is taken from the Canada Year Book:

"Protection is automatic without any formality. However, a system of voluntary registration is provided.

Copyrights shall subsist in Canada...in every original literary, dramatic, musical and artistic work, if the author was, at the date of the making of the work, a British subject, a citizen or subject of a foreign country which has adhered to the Berne Convention and the additional Protocol...or resident within Her Majesty's Dominions. The term for which the copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author and a period of fifty years after his death.

...the works of Canadian authors are protected in the United States without the formality of compulsory registration or the obligation of printing in the United States,

Copyright protection is extended to records, perforated rolls, cinematographic films, and other contrivances by means of which a work may be mechanically performed."

Application of Canadian Copyright Law:

In determining whether a copyright has been violated or not, certain conditions have to be considered. Clearly, if permission to use a property under certain conditions is asked for and received, there is no infringement whether a fee is involved or not. There is no infringement unless a substantial part of a work is copied. The word "substantial" must be interpreted qualitatively as well as quantitatively. The economic effect of copying a substantial part of the work is the most important factor to be considered in applying the law to a given situation.

Special consideration is given in applying the law to private study, research, review and criticism. Criticism could include teading about a work.

The principle of "fair dealing" or "fair use" is usually illustrated by an example such as making a single copy of a work by an individual who is using the copy for study or criticism. However, in this instance, it would not be "fair dealing" if one person made several copies and distributed them to other individuals even though no charge was made. Again, a major consideration, is whether such copying will mean the purchase of fewer copies of the original.

As it stands now, the Canadian Copyright Act is fairly restrictive. The common practice of making photo copying machines available in libraries leads to violation of copyright. Photographing illustrations in books and magazines and making them available in the form of slides almost certainly constitutes infringement. Copying radio or television programs by means of magnetic tape and playing them back to several classes is probably a violation of the provisions of the act. None of these violations has ever been tested in court.

It is clear that the present Act does not take into account present technology, to say nothing of future developments in technology. What is more the responsibilities of copyright holders and copyright users are not clearly stated. Most infringements take place because these responsibilities are either not stated, not stated clearly, or not known.

The problem of satisfying the requirements of educators as well as the requirements of the creators and distributors of materials must be approached in the light of present and future circumstances and present and future needs.

3. SOLUTIONS TO THE PROBLEM:

The problem can be broken into a number of parts, each part constituting a problem in its own right. These might be stated as follows:

(1) The problem of clarification.
(2) The problem of accessibility and distribution.
(3) The problem of classification.
(4) The problem of payments.
(5) The problems of enforcement.

Clarification:

In any game, it helps to know the rules which the referee is enforcing. The onus is divided. The authorities who make the rules must organize them logically and word them clearly. The rules should be made available to all concerned. The players for their part have a responsibility to know what the rules are and to play the game according to the rules. The analogy is imperfect but it illustrates one aspect of the problem of clarification. The Copyright Act must set forth clearly the definitions, the rules and the reasons. Most teachers, media specialists and ETV practioners are playing the game now according to the rules as they see them from their particular point of view. This is understandable because either they have never been confronted with Canadian copyright law at any point in their activities or the law which they are aware of is so vague that the broadest, most generous interpretation is invariably assumed. While ignorance of the law is no excuse when it comes to enforcement, ignorance of the law is understandable particularly in the case of a classroom teacher who assumes that she has a right to choose for her students, or to help them choose for themselves, educational experiences in whatever form and from whatever source.

It is the responsibility of the lawmakers to make the laws as clear as possible; it is the responsibility of the general public, and particularly educators, to know what the law says and to abide by it. But there is also a very important responsibility falling upon the owner of the "intellectual or artistic property" which is protected by the law. The owner should make clear to the purchaser or prospective purchaser what the limits of his

rights are, what uses are legitimate and under what conditions. The owner should also make clear what constitutes, under the law, an infringement of his rights. This is done in some cases now, but generally in small print and usually in vague language.

The Problem of Accessibility and Distribution:

When the present Copyright Act was passed by the Canadian parliament in 1924, materials used in schools were limited. Almost the only books available were readers and a few authorized texts. Most stuients had access to an encyclopedia and perhaps a small collection of books for general reading. Teachers depended upon magazines and catalogs for illustrative material. Once in a while a "magic lantern" was employed, and sometimes an ancient form of the opaque projector. Most teachers prepared their own "seat work" and duplicated it by hektograph. Some teacher magazines printed outlines in hektograph ink so that teachers were expected to make copies from them. The rare school had a phonograph and while radio receivers were available but scarce, programs for schools were not.

In the past 45 years, technology has provided many more opportunities for those involved in instruction, (1) to have access to almost unlimited information in a variety of forms, (2) to make copies of such information simply and relatively cheaply and (3) to store and to distribute information in whatever ways seem appropriate.

It is not exaggerating unduly to suggest that technology now exists which makes it possible to tap sources of knowledge wherever generated and stored. What is more pertinent here is that technology now exists which makes it possible to copy bits of knowledge in verbal, pictorial or electronic form and to reproduce and distribute those bits of knowledge on demand.

New technology is capable of bringing rich resources to the instructional process, but even more significantly, is capable of carrying out the major part of the instructional process itself. The most important element is not the "hardware" but the "software" and it is the quality of the "software" as well as its accessibility and reproducibility which should be regarded as essential. Software is produced by "authors" who are as vital to the product as the writer is to the book.

Those who are charged with the responsibility of public education should not be denied accessibility to any source of knowledge. Accessibility should mean not only being able to locate information (catalogs, indices, etc.) but also being able to obtain that information in whatever form with minimum difficulty and at a time which is optimal from an instructional point of view. The distribution of any segment of knowledge to individuals or groups separated in space and/or time should not be interferred with, provided that the owner of the rights to the particular expression of that segment of knowledge receives adequate compensation.

It is suggested that copyright law should take into account both the universal accessibility of information and the distribution of it in the context of present and future technology.

The Problem of Classification:

So far in this paper a number of words or expressions have been used interchangeably. These have included: "products of the knowledge, skill, etc. of a professional person", "media materials", "intellectual and artistic properties", "work", "educational experiences", "information", "knowledge","software". In a general way, these have all referred to the same thing. Perhaps it would be useful now to classify the materials which can be involved in instruction in the light of the copyright problem as stated above.

It should be clear first of all that an idea cannot be copyrighted, only the expression of an idea. A bit of information usually cannot be copyrighted, only the form in which that information is expressed or presented. For example, a collection of data about Montreal—size, geographic location, population, climate, etc. can be copied without breach of copyright. But an essay about Montreal, a television program, a film, a set of slides or transparencies—any of these forms which may include the data is protected by copyright law. To the raw data has been added something unique, something creative—a plus which gives it value beyond the information itself. It is this plus which is protected by copyright law.

Before attempting any classification of materials, let us list
(1) examples of materials, together with
(2) the "copying" techniques which could be employed. Also,
(3) some assessment of the factors which might lead to copying.

1	2	3
printed words	photocopying and dry copying	original is expensive, only portion is wanted.
printed picture, diagram, map, etc.	photocopying and dry copying photograph or slide.	picture(s) is readily available.
		picture makes a significant point in instruction.
		picture in printed form is easily destroyed.
		picture should be in convenient form for re-use.
slide	photograph or slide	picture should be available to many classes at once.

filmstrip	photograph	an entire filmstrip is difficult to reproduce without elaborate equipment.
film	photography videotaping of projection	all or portion of a hard-to get film may be made more accessible.
disc recording	magnetic recording	magnetic recording preserves the original disc.
		magnetic recording may be more conveniently used.
		material on a single disc can be made available to many more classes.
radio program or sound tape recording	magnetic tape recording	preserves radio program for re-use at a convenient time.
		copies can be made available for storage in learning resource centres or libraries.
television program or videotape recording	magnetic video tape recording	preserves television programs for re-use at a convenient time.
		copies can be made available for storage in learning resource centre or libraries.

A glance at column one will indicate that some items are relatively simple, others are more complex. Some are the product primarily, of one individual's skill and ingenuity, some involve the talents of a large team of professionals. Some are relatively inexpensive to produce, others are very costly. Teachers and students are capable of producing some, in other cases they are not.

Column two indicates that for some items the method of copying is readily available and reasonably inexpensive; other items can be copied only on costly equipment operated by reasonably skilled persons. Some reproduction methods will provide many copies at reasonable per unit cost, other methods provide a single copy at significant cost.

The factors listed in column three, though by no means exhaustive, are sufficient to lead to the conclusion that some will result in a real reduction of sales of the items, while others will not affect sales in any degree.

The nature of the information expressed in various kinds of media provides a basis for classification. It was stated earlier that there must be added to information a plus and it is this plus which in fact is protected by copyright law.

While in a sense any presentation of organized data has the stamp of the organizer upon it, it should be possible to deal with certain kinds of material which have a very small plus factor involved in a different way from materials which have a significantly large plus factor. Statements of factual data whether verbal or pictorial are substantially different from materials which embody a high degree of ingenuity, creativity, and professional skill.

Some materials no matter how creative or ingenious have a "time bound" quality. That is, they may be relevant now and for a limited time into the future but they quickly lose their significance because a certain set of circumstances may alter or disappear. A film intended to be an introduction to Expo 67 or a television program which had as its objective the provision of background information for the journey to the moon soon are out of date. Time bound materials, then, might be considered in a different light from materials which will be in demand for many years.

The nature of the material and the way it is organized and presented will have a bearing upon how the material is used in the instructional process, how valuable it is deemed to be and how strong the motivation to copy the material will be.

There is still another category which is most important. This is copying through broadcasting. For our purposes this includes the airwaves and cable. In each case, a single item can be transmitted to many receivers and the effect is essentially the same as if every terminal had its own copy of the original and presented them to the audience at the same time. While magnetically taped materials are most often "broadcast" in this way, almost any kind of materials can be transmitted through the air or over wire. What is more, modern technology makes it possible to make a copy of the transmission at each terminal and further copies from that copy. This includes the taking off of facsimile copies from cathode ray tubes.

In summary, the problem of classification is one of identifying copying practices which are essential to good teaching in the modern world and which can be undertaken freely without a deleterious effect upon the source of useful creative materials. Copying practices which are essential to good teaching but which must be related in some way to an adequate system of remuneration must also be identified.

A new "fair dealing" formula needs to be evolved to take into account the various considerations which have been noted in this section.

The Problem of Payments:

There are at least two basic points of view with regard to payments for the right to use copyright materials: (1) that a single payment give the purchaser the right to use and re-use of the copyright materials within certain agreed upon limits without any additional payments being required: and (2) that the payment made by the purchaser for the use of the material bears a direct relationship to the number of uses that is made of it. The number of users (size of audience) may also be a factor. The first point of view we might call "once-and-for-all" method of payment, the second, the "fee-for-use" method of payment.

The first method has the advantage of simplicity and frees the user from becoming tangles in "red tape". The second method, while more complicated, does reward the creator of materials which are most useful and therefore most used.

When one buys a book, a percentage of the sum paid goes to the author. The publisher pays the costs of the book out of the returns on sales. The buyer of the book, through his payment, has the right to read the book, lend it, give it away, sell it, or even destroy it. He can read it aloud to an individual or group of individuals, but normally he cannot give a public performance from it or sell recordings of it without permission. He can copy small portions of it if it is for purposes of study, research, review, or criticism. Within reasonable limits, the buyer of the book can use it in many ways in return for his "once-and-for-all" fee.

Now let us look at an example of the second method. Suppose the buyer of the book is an instructor and wants to copy several pages for the use of his students. Suppose also that he is anxious to be fair with the author and publishers of the book. There is no economic sense in asking students to purchase the whole book because only certain pages are useful. One suggestion might be that the publisher could fix a fee on a per page copied basis. This might be calculated by taking the normal price of the entire book and dividing it by the number of pages (e.g. a four hundred page book costs $8. Cost per page 2¢. Fee for copying 10 pages for 30 students —$6.) This is an example of a fee-for-use method of payment, an example which takes into account the size of the audience.

When a purchaser buys a film, he acquires much the same rights as a buyer of a book with about the same limitations. However, there are some interesting differences. The buyer of the film may take it around from classroom to classroom and show it eventually to thousands of children. He could obtain much the same result by transmitting it once over television. But unless television rights are specifically included in the purchase price, and they almost never are, he is prevented from following this course unless a fee is paid. The fee is usually related to the number of showings over television and the size of the audience. Sometimes a television teacher wants to use only a portion of a film in a television lesson. This use also is not covered in the purchase price. The owners of the rights charge a fee based on a formula which takes into

account the length of the segment expressed either in feet or minutes, together with the number of showings as well as the size of the audience.

Method of payment for the use of copyright materials should be fair and equitable. As far as possible the users of materials through one medium should not subsidize the users of materials through another. For example, school authorities who purchase film should not pay more in proportion than school authorities who distribute film through television.

The method of payment should be as simple as possible to administer and to collect. Rights of purchasers should be clearly understood at the time of purchase. If the purchaser wishes, for example, to go beyond those limitations and make copies for instructional purposes, the owners of the material should indicate clearly the fees required and the method of payment.

The Problem of Enforcement:

Compliance with any law is related to a number of factors:

(a) the visible reasonableness of the law itself.
(b) the clarity of the language in which the law is stated.
(c) compliance with the law should be relatively simple.
(d) the enforceability of the terms of the law.

Users of protected media materials must be able to see the reasoning behind any copyright law. It must not only be fair and just to all concerned, but fairness and justice must be obvious to any reasonable person. The law should be clear as it relates to every category of violation so that there is as little ambiguity as possible when the terms of the law are applied to any particular activity. Compliance with the law, particularly when permission and payment is involved, should be as simple as possible. Penalties for infringement should be enforceable without prejudicing either party. Too often, a rights holder will not take action against a customer or potential customer.

A statement of problems is not a statement of solutions. However, it is important that all of the problems referred to above be taken into account in resolving the questions relating the copyright issue to educators who use protected materials.

4. THE FUTURE OF THE PROBLEM:

As far as the future development of materials for educational use is concerned, it is almost certain that teams of professional and creative people will be involved rather than individuals. The finished product will result from the utilization of a variety of specialized skills contributed by artists, authors, cameramen, directors, performers, psychologists, subject consultants, etc. It is also more than likely that the work of these creative people will be co-ordinated by commercial concerns or institutions which will hold all the rights including copyright. Some royalties may be

payable to certain classes of persons but companies will find it simpler to buy out all the the rights at the outset. The company which owns the material can then determine its own marketing policy, including which rights are granted to the purchaser and which rights are retained by the owner. If unauthorized copying takes place to the extent that the production of the material becomes unprofitable then the company will no longer employ their creative staff in producing instructional materials but will turn to something else.

The company has a number of alternatives. The initial purchase price can be high enough to offset reduced sales which may result from unauthorized copying; the initial purchase price could be augmented by an additional sum which gives the purchaser certain copying privileges or the company could grant permission to copy on receipt of an agreed fee. The last possibility is not very satisfactory for it is a nuisance for the honest purchaser and most difficult to enforce on the part of the rights holder.

Another future trend which has a direct bearing upon the copyright issue is the greater use of learning resource centres in schools. This has meant less use of a textbook for every child and more use of fewer copies of several texts. In fact, in regard to all types of materials the trend is away from depth toward breadth--more items, fewer copies. An extension of this, perhaps the ultimate extension is the concept of information retrieval. In its simplest form the student goes to the extended library or learning resource centre in the school and with the help of the index system or the librarian locates the item he wishes, and obtains the use of it for a certain period of time. In its more complex electronic form, the student consults the index system in the school, finds the title of the item needed, notes its code number, goes to a study carrel, presses the appropriate numbered buttons and within seconds, the item he seeks comes up before him on a small cathode ray tube. While it may be a long time before this present technology becomes a reality in most schools, the illustration does bring out the economic dilemma faced by the producers of the software. Until recently they could predict the recovery of their costs and anticipate making a profit by forecasting their returns on a certain number of copies sold. It is possible that in the future, the most significant concern to the producer will be the number of times the item was used.

Several interesting ideas have been developed to take care of this eventuality A proposal in 1965 by the Authors League of America Inc. anticipates a national clearinghouse through which all royalties would be paid. Only institutions holding a license could make copies from books and periodicals. License-holders would buy copyright stamps from post-offices, etc. and when copies are made the appropriate stamp would be fixed to a card, together with a code number of the book and the card sent to the clearinghouse.

A similar idea was proposed by Williams and Wilkins Publishing Company but related more particularly to owners of copying machines. There would be a clearinghouse as in the authors proposal and fees are related to the use of the copy machine.

* These examples are from the book Nearer to the Dust - Copyright and the Machine - George A. Gipe, Williams and Wilkins.

Both Canadian and American copyright law is being revised. The law in the United States was in the midst of the legislative process before the election of 1968. It is likely that it will be re-introduced this fall. Educators in the United States in their representation to various Congressional committees have made the following points.

1. Guarantee fair use of copyrighted materials by teachers.
2. Assure accessibility of materials to teachers.
3. Remove restrictions on educational technology.
4. Remove restrictions on instructional television.
5. Relieve innocent teachers from copyright infringement damages.

The purpose of this paper has been not to formulate a position which educators should take with respect to copyright problems, but rather to set forth information and ideas which should be taken into consideration when such a position is being developed.

REPORT TO THE INSTRUCTIONAL MEDIA COMMITTEE RE: CANADIAN COPYRIGHT INSTITUTE

At the last meeting of the Instructional Media Committee, I recommended that we undertake, jointly with the Canadian Copyright Institute, the preparation of a presentation to the appropriate federal body concerning questions related to copyright and instructional media. I was asked to determine the status of the Canadian Copyright Institute and to assemble some information about it.

The Canadian Copyright Institute is a registered association under Ontario law with a formal constitution approved in October, 1965.

Objectives:

Its objectives are set forth as follows:

(a) to encourage a better understanding of the law of copyright on the part of its members, the public, and users of copyright material generally.

(b) to engage in and foster research in Canadian, foreign, and international copyright law, and for such purposes to make gifts to Universities and other institutions.

(c) to receive, acquire and hold gifts, donations, legacies, and devises.

(d) for the objects aforesaid to publish, sell, and distribute literature and to make representations to governing authorities.

Membership:

Membership includes representatives from book manufacturers', book publishers' and booksellers' organizations, from the Canadian Authors' Association, Canadian Labour Congress, Association of Canadian Television and Radio Artists, graphic designers and representatives of the graphics industry, Queen's Printer, Canadian Music Publishers, and many others.

There are three categories of membership: Fellows (individuals) Associate Members (corporations and associations) and Sustaining (individual and corporate who pay the appropriate fees).

Officers:

As of May, 1969, according to the Annual Report, the officers were as follows:

Mr. Michael I. Pitman - (Copp-Clark) - Chairman
Mr. J. Z. Leon Patenaude - (French language publishers) - Vice Chairman
Mr. Barry Britnell - (Albert Britnell Book Shop, Toronto) - Secretary
Mrs. Lyn Harrington - (Canadian Authors' Association) - Treasurer
Mr. Roy C. Sharp QC - (Lawyer) - Executive Director

Activities:

The following are among the activities reported in the last annual report (May, 1969):

1. entered into agreement with American printing and publishing industry to press for Canadian exemption under American Copyright Act relating to provisions of its "U.S. Manufacturing clause". With certain exceptions, copies of printed material distributed in United States must be manufactured in that country.

2. prepared brief re: copyright to Economic Council.

3. studied effects of new technology on copyright and developed a recommendation urging that copying be controlled by a licensing system.

4. met with Hon. S. R. Basford and Mr. A. M. Laidlaw, who is in charge of Copyright office in Ottawa, urging a broadly based government committee to study matters of copyright.

5. attended international conferences on copyright.

R. A. MORTON

Research and Liaison

(3)

THE CURRENT COPYRIGHT SITUATION

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1. SUMMARY OF THE CANADIAN COPYRIGHT LAW

(1) What Is Copyright?

Copyright, as its name implies, is merely the right to restrain copying. Copyright protects the mode of expression, the actual words used in a work, not the ideas expressed therein.

TheoCanadian Copyright Act came into force in 1924. By the terms of this Act, copyright subsists in every original literary, dramatic, musical and artistic work. The author must, at the date of the making of the work, be a British subject, a citizen or subject of a foreign country which has adhered to the Berne Convention, or reside within the British Dominions; and if in the case of a published work, the work was first published within British dominions or in a country which has adhered to the Berne Convention.

(2) A Formal Definition of Copyright

Harold Fox in his article "The Canadian Law of Copyright" paraphrases the statute definition of copyright effectively:

Copyright is defined by the Act as the sole right to produce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof. Copyright as conferred by the statute includes the sole right to produce, reproduce, perform, or publish translations of the work, the sole right to convert from a dramatic work to a non-dramatic work, to convert from a non-dramatic or an artistic work to a dramatic work, by way of performance in public or otherwise, to make records, perforated rolls, cinematograph films or other contrivances by means of which the work may be mechanically performed or delivered; to reproduce, adapt, and publicly present the work by cinematograph, to communicate it by radio communication, and to authorize any of these acts.

(3) General Facts

1) Formalities: Under Canadian law, copyright protection is automatic without any formality. The statute contains provisions for registration of copyright, but these are permissive only and no registration need take place. The works of Canadian authors are also protected in the United States without the formality of compulsory registration or the obligation of printing in the United States.

ii) Term of Copyright: The term for which copyright subsists, except as otherwise expressly provided by the Copyright Act, is the life of the author and a period of 50 years after his death.

iii) Assignment and Licence: Copyright is a propery right, a form of intellectual property, and it can be bought, sold, leased or divided. The creator may assign his copyright either wholly or partially and either generally or subject to territorial limitations and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by way of licence.

(4) Infringement

Infringement of the copyright law is defined by the Act as follows:

> Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to which is by the Act conferred on the owner of the copyright.

Thus, it is an infringement (without the consent of the copyright owner) to issue copies of a work to the public, to perform it in public, to reproduce it in any manner, to make a translation of it, to convert a novel into a dramatic work, to convert a dramatic work into a novel, and etc. However, it is significant to note that copyright is not an absolute monopoly. It can only protect the mode of expression, not the ideas expressed in the work. Thus, if another individual composed a similar work independently of the copyright owner, there would be no infringement.

(5) Lawful Use of Copyright

In determining whether a copyright has been infringed or not, certain conditions have to be considered. As was previously stated, there is no infringement of the copyright law if permission to use a work under certain circumstances has been granted, whether a fee is involved or not. Also, there is no infringement of copyright in a work unless a "substantial part" is taken. Furthermore, the copying of even a "substantial part" is permissible as "fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary". The use must be fair though.

However, such "fair dealing" must be practiced by the individual for himself and not by any one person on behalf of another. For example, it would be illegal if educational institutions subsidized the printing and publishing of a pirated edition, and then distributed copies to students without charge.

The Court has laid down certain guidelines to help it define this term called "fair dealing". The word "substantial" must be interpreted qualitatively as well as quantitatively. Quality may be more important than quantity. For instance, a small part of the original work may form a large and substantial portion of the second work. The economic effect of copying a "substantial part" of the work is the most significant factor to be examined in applying the law to a given circumstance.

II. ADVANTAGES AND DISADVANTAGES OF OUR PRESENT COPYRIGHT LAW

(1) The Advantages

Copyright law provides the basic system of incentive, with its principle that reward should tend to be proportionate to the amount of use an intellectual property receives. The creator, artist, author, or performer has produced a unique and original work. Canadian copyright law protects the integrity of his creation from misuse in presentation and plagiarism. It also ensures the creator that he will receive compensation from those who benefit from his work.

The Canadian Copyright Institute has stated:

> Copyright is essential to the development and preservation of a literate society, because it assures the continuous flow of fresh ideas. Modern copying machines can facilitate the dissemination of ideas, but when they are misused, they threaten to dry up the source. Indiscriminate copying can so reduce sales prospects that numerous important publications would become uneconomic to produce.

If free enterprise could not produce the publication our society requires, would a subsidized government agency then be established? If so, would this not give such an agency the power to exercise a degree of censorship? This would place the concept of freedom of expression in jeopardy. Thus, it is evident that copyright laws are necessary to safeguard the creator's and the publisher's financial investment from injury.

(2) The Disadvantages

The main concepts of the Copyright Act were designed to accommodate a technology of reproduction and communication that is now largely outdated. There is a need to redefine the law in the light of the new technology and new educational requirements. The Economic Council of Canada and an Inter-departmental Committee on Copyright set up by the Minister of Consumer and Corporate Affairs have been investigating a revision of the Copyright Act. In any revision, the legitimate interests of all parties - the creator, the distributor and the educator must be satisfactorily dealt with in the light of present and future requirements.

There has been a growing awareness of the shortcomings of the Canadian Copyright Law with respect to the present technology. The Act fails to take account of the recent technological advances. In a brief to the Economic Council of Canada, the Canadian Association of University Teachers and the Ontario Universities' Television Council saw the new media challenging existing copyright law in two ways:

> First, new forms of expression such as electronic music, computer programs and videotape require protection as much as do the standard forms. Second, there are now new techniques by which old rights may be infringed. The photocopier is, of course, the leading example. Its use is economical, technically simple, widespread and difficult to control. No longer is it easy to monitor the amount of use some works receive. This frustrates the copyright owner because, as a general principle, copyright law seeks to make the reward commensurate with use.

Since educational institutions will draw more and more heavily on such mechanical devices as photocopiers, computers and taped lectures, revision of the copyright law concerns all educators both as users and creators.

The new technology has a clear capacity to alter dramatically the physical structure of educational institutions as we know them. It will enable school systems to offer more educational experiences to a greater number of students. The educator, teaching in this more open and more demanding environment, needs to have a wide range of materials at his disposal. However, at present, he is inhibited from making full use of the new technological resources by the restrictions placed, for whatever good reason, on them. Substantial changes to our Copyright Act would promote educational goals.

Yet technology is only one aspect of the situation. Glaring inadequacies in the copyright law also exist in other areas:

I) The Act needs clarifying. Concrete guidance concerning the copyright position of the educator is required. For instance, the responsibilities of copyright holders and copyright users are not clearly stated. The current copyright status of videotape lacks clarity. The principle of "fair dealing" is perhaps the worst example of vagueness in the law. The Court has established criteria by which "fairness" is to be judged in any factual situation, but they are too vague and most difficult to apply in practice. A few situations are, of course, clear but the vast majority are not. Consequently, most infringements occur because the Copyright Act either does not state, or state clearly, its terms.

II) In a brief to the Economic Council of Canada by the Association of University Teachers, the following statement appears. "Insofar as clear answers to modern problems may be found in the law, those answers are fortuitous and not always desirable."

III) Other frustrations arise over the problem of accessibility and distribution. To secure clearances or licences from owners, an educator must go through a procedure which is exceedingly cumbersome under our current Copyright Act.

IV) Canadian Copyright law also frustrates the copyright owner. He lacks an effective remedy for small isolated acts of infringement. Criminal penalties are rendered unsuitable due to the lack of specificity in the law.

III. ACTIVITIES OF VARIOUS GROUPS REGARDING THE COPYRIGHT SITUATION

(1) The Economic Council of Canada and an Interdepartmental Committee on Copyright set up by the Minister of Consumer and Corporate Affairs have been investigating a revision of the present law.

(2) The Canadian Association of University Teachers and the Ontario Universities' Televison Council have submitted a brief to the Economic Council of Canada on the subject of general revision of the Copyright Act.

(3) In general, Canadian educators have not taken a stand.

(4) The Educational Media Association has established a special committee to study the copyright situation as it pertains to the media.

(5) The Canadian Copyright Institute has studied the effects of the new technology on copyright and has developed a recommendation urging that copyright be controlled by a licencing system. They have also prepared a brief regarding copyright for the Economic Council of Canada.

IV. SUMMARY OF INTERNATIONAL COPYRIGHT LEGISLATION

(1) General Facts

International Copyright law over the last century has encouraged the creation and international dissemination of new works. It is a strongly held belief that an international respect for copyright is essential to the development of knowledge and culture.

At present there are two multilateral agreements in the field of international copyright:

i) The Berne Convention was established in 1886 for the protection of literary and artistic works. It has been revised several times since. The most recent revision was the Stockholm Text (1967), a protocol which wanted to eliminate royalties on books and related material going to the developing countries.

ii) The Universal or Geneva Convention was set up in 1952, under the guidance of Unesco. Its membership consists of 57 countries including the United States. This treaty offers authors and publishers a lesser degree of protection than the Berne Convention since it merely requires that the same level of protection should be granted foreigners as they receive in their own country. Article XVII (of the Universal Convention) prevents developing countries from leaving the Berne Convention to join the Universal Convention. However, the developing countries are attempting to have this safeguard clause deleted.

(2) Canadian Commitments

Canada subscribes to the Rome Text (1928) of the Berne Convention. However, it has not ratified the Brussels (1948) or the Stockholm (1967) Texts. Canada also subscribes to the Universal Copyright Convention. Canada is party to the Toronto Agreement. Canadian printing and publishing industries are currently engotiating with the United States for exemption from the Manufacturing Clause in their Copyright Act. Canada is also a member of the Florence Agreement between 53 countries which exempts them from customs and tariffs on books, periodicals,

and other types of intellectual property, and provides for their free flow between all the countries involved.

(3) Problems Arising From Two International Copyright Conventions

Various problems arise from the co-existence of the Berne and Universal Conventions. For example, two sets of international copyright rules lead to confusion and restrain the free flow of intellectual property among the various countries of the world. "Furthermore, the existence of two levels of protection may tend to discourage authors in developed countries from writing works of particular value to developing countries since such works would find their chief market in the developing countries where their protection would be lower than in the developed countries".

A Joint Study Group, composed of representatives of 26 countries including Canada, has been established to study the entire situation of international copyright relations in an attempt to solve these problems. This Intergovernmental Committee is examining:

i) the establishment of an international system which would allow developing countries a greater degree of access to protected works, while respecting the rights of authors;

ii) the needs of developed and developing countries in the international copyright field;

iii) possible methods of linking the two conventions.

(4) The Policy of The Canadian Government

The Canadian Government has established an Inter-departmental Committee to formulate the policy to be taken by our delegation at the Joint Study Group's sessions. In a brief to the Interdepartmental Committee, the Canadian Copyright Institute recommended the following policy:

i) ".....a high degree of copyright protection to encourage authors and publishers to provide new and improved works for rapidly changing societies".

ii)".....the establishment by the governments of developed countries of national clearing houses which would undertake to direct publishers of developing countries who want certain copyrights to local copyright owners or to negotiate on their behalf..... Such national agencies would be familiar with their own national copyright laws, the authors, and the publishing houses concerned, and the business practices of their own country".

iii) "We recommend that the prices paid for the purchase of copyrights, whether they be for reproduction or translation rights, should be the prices prevailing on the international market. Where there is any reduction in this price, the difference should be paid out of foreign aid moneys and not borne by the copyright owner".

iv) In order to provide a link between the two Conventions, some of the following suggestions were offered:

a) "all countries except developing countries must belong to both conventions".

b) "minimum standards of protection now lacking in U.C.C. be spelled out".

c) "an incentive be provided to developing countries to join Berne by providing that a developed country is not required to give any more protection to a developing country than that country gives to the developed country".

(5) Influence of the United States on Canada's International Copyright Policy

"Canada at present supplies few works required by developing countries. It could therefore be tempting to recommend the expropriation of the intellectual property of authors of other countries in lieu of direct financial and material aid by Canada. It should also be borne in mind that Canada is currently negotiating with the U.S. for exemption from the U.S. Manufacturing Clause in their Copyright Act. Canada is in a sense a trustee for many U.S. copyrights published simultaneously here and in the U.S. Under Berne, such works are considered to have Canada as their country of origin and would, therefore, be subject to the provisions of Berne to which Canada subscribes. If Canada should take any action to place these copyrights in jeopardy, she might never again be able to look to the U. S. for redress from the U. S. manufacturing provisions".

(6) Views of Canadian Educators Regarding International Copyright As It Affects Developing Countries

i) "We recognize vexing problems relating to copyright, wherein legitimate rights of authors, composers and other artists can act as a deterrent to widest and most useful dissemination of ideas.

Nevertheless, we feel that in the interests of wiser and more effective dissemination of knowledge and acquiring of technical skills, the greatest possible relaxation of copyright, consistent with reasonable rights of authors, should be established within the field of education".

ii) "Easier access to information in the educational field is greatly to be desired. The only comment I might make is that the study does not specifically mention the increasing use of photocopying. We find that in Ontario, for research and information retrieval, increasing use is made of photocopying. Copyright laws do not appear to specifically rule out the making of single copies for research purposes, but it is clear that these laws could not have anticipated present and future practice in this area."[5]

iii) "Experience of Departments of Education in respect of curriculum, text-books and audio-visual instructional media would probably support the following conclusions:

a) There are features of a public education enterprise which appear to justify the making of specific differentiations in the persons, organizations, or agencies to whom internatioinal copyright applies. A bona fide public education need should receive some priority over that of a purely commercial nature. Past experience indicates that the protection afforded copyright material has in some cases prohibited its use for educational purposes and in other cases made the cost prohibitive. It may be of significance to note that this kind of protection is not necessarily being applied to the author.

It may be being applied to the owner of the copyright.

b) It would appear that the present situation in respect of copyright needs revision in the light of new educational technologies including radio and television,

as well as devices for reproducing other material. The protection afforded owners of copyright material in some cases may be becoming ineffective because of the multiplicity and extensive use of reproducing equipment. It may also be considered an unduly rigid protection by those seeking to use material for non-profit, educational activities.

c) In considering educational needs for copyright material, it seems necessary to recognize:

(i) that expenditures of public funds are subject to limitations,

(ii) that in many educational systems there is a considerable degree of decentralization of authority for purchases and use of a wide range of educational material,

(iii) that there is an almost continual change in the kind and variety of material being made available".

iv) "As a matter ultimately of international political stability, developing countries must secure full access to educational and scientific works produced in developed countries. The only issue is the technique of making them available. We submit that the Protocol technique is preferable to external aid".

v) "Canada should also accede to the Convention Establishing the World Intellectual Property Organization..... the benefit gained by accession is to secure a place in organizations which will have important influences upon future developments in international copyright."

vi) "It should be possible to import, even for the purposes of sale in Canada, copies of any works where the copies were produced abroad by the copyright owner or under authority granted by him..... The importation privilege would help keep Canadian prices for published materials as low as possible."

8. Stand of American Educators on Copyright Revision

Educators in the United States in their representation to various Congressional Committees have made the following points:

i) guarantee fair use of copyrighted materials by teachers,

ii) assure accessibility of materials to teachers,

iii) remove restrictions on educational technology,

iv) remove restrictions on instructional television,

v) relieve innocent teachers from copyright infringement damages."

CONCLUSION

The purpose of this paper has been to present a summary of the copyright situation, as it now stands on a national and international level.

FOOT NOTES

1. The Copyright Act.

2. Brief to the Interdepartmental Committee formulating the policies of the Government of Canada on the position to be taken by the Canadian delegation to the International Copyright Joint Study Group by the Canadian Copyright Association, Page 5.

3. ibid, page 7.

4. Statement by the Deputy Minister of Education for the Province of Nova Scotia.

5. Statement by the Assistant Deputy Minister of Education for the Province of Ontario.

6. Article entitled, "Some Notes Concerning International Copyright," May 26, 1969.

7. Brief to the Economic Council of Canada by the Canadian Association of University Teachers and the Ontario Universities' Television Council, page 33.

8. ibid, page 33.

9. ibid, page 34.

10. Article entitled "Copyright and Instructional Media in Canada," page 13.

(7)

COPYRIGHT AND EDUCATION IN CANADA

POSSIBLE POSITIONS BY COUNCIL OF MINISTERS OF EDUCATION

R. A. Morton - - March, 1971

The following are positions or various aspects of copyright law which might be taken by the Council of Ministers of Education in Canada. While the primary concern of the I.M.C. is media, the points outlined below include all kinds of protected works. So that we might determine the degree of consensus on each point would you check the appropriate space: A - agree, N - neutral, D - disagree, Q - doubtful.

(A)_N_D_Q_ 1. All published works should be available for legitimate educational purposes.

(A)_N_D_Q_ 1.1 Education at all levels requires access to published works of all kinds and in all forms.
The law should make it mandatory that the owner(s) of any material - print or non-print - make such material available for purposes of study subject to reasonable conditions set forth by the owner(s) of the intellectual or artistic property.

(A)_N_D_Q_ 1.2 The owners of works published or produced in any form - should, by law, state clearly, in writing, before the work is offered to the public what rights are being given in exchange for the required fee or other consideration. The statement should include specifically what the purchaser or lessee may or may not do with the particular item.

(A)_N_D_Q_ 1.3 Copyright law should include regulations having to do with the accessibility of works from other nations on terms consistent with international conventions to which Canada is a party.

(A)_N_D_Q_ 2. The Copyright law should clearly define "fair dealing" or "fair use" as it applies to the use of protected works in educational institutions by students and teachers.

(A)_N_D_Q_ 2.1 Any basic definition should take into account the intention or the educational purpose for which the work is copied.

(A)_N_D_Q_ 2.11 Systematic instructional activities should be included in the exemptions as well as private study, research, criticism, etc. (as in the present law).

(A)_N_D_Q_ 2.2 Any basic definition should take into account the circumstances under which copying within an educational institution might be considered to be fair, e.g.:

2.21 when copies are made from works purchased or leased by the educational institution and normally stored within the institution in which instruction takes place;

2.22 when copies are not stored or retained for re-use after they are used in any particular instructional sequence;

2.23 when the number of copies does not exceed the number of students who will use copies as part of the particular instructional sequence;

2.24 when copies are made within the same institution, school or building in which the instruction actually takes place;

2.25 when the amount or proportion of a work is not substantial when related to the extent of the work as a whole.

2.3 Similarly "fair dealing" or "fair use" must be defined in terms of performance of a protected work. "Performance" according to the present Copyright Act is defined as "any acoustic representation of a work, or any visual representation of any dramatic action in a work, including a representation made by means of any mechanical instrument or by radio communication". Certainly this definition will be modernized to include performances through any kind of media, electromagnetic or otherwise.

2.31 Performances which should be considered fair should include:

2.311 a performance which is part of systematic instructional activities in any school or educational institution;

2.312 a performance which is part of private or individual study, research, etc.;

2.313 a performance in the course of the activities of the school for which no admission fee is charged.

2.32 Sound or video taping a performance live, or off the air, or off cable, and the replaying of that performance in whole or in part should be considered "fair dealing" or "fair use":

2.321 when it is used as part of systematic instructional activities in any school or institution provided that it is erased within one year of its initial broadcast date.

A N D Q

2.322 when it is replayed for private or individual study, research, etc. provided that it is erased within one year of its initial broadcast date. Possession of a tape of performances beyond that date would be legal evidence of infringement unless an agreement to the contrary exists in writing.

A N D Q

2.4 Any basic definition should take into account financial or commercial implications particularly as they relate to:

A N D Q

2.41 whether the copying (or performance) of the work has or could result in financial gain for the copier or user;

A N D Q

2.42 whether the copying (or performance) of the work could result in a loss or potential financial loss to the owner;

A N D Q

2.5 While the general definition of "fair dealing" or "fair use" should be set forth in the Act, application of any "fair dealing" or "fair use" definition should be governed by a schedule of regulations.

A N D Q

2.51 A permanent review board should be established to assist in keeping the regulations current and enforceable. Educators should be represented.

A N D Q

3. There is need for a careful logical classification of works which are protected by a copyright statute. Each would involve its own degree of protection and regulation.

A N D Q

3.1 Classification should take into account the degree of originality and creative expression. This might range from news stories, non-fiction in magazines, tapes of newscasts etc. which involve a limited degree of originality to novels, poems, and other artistic works which involve a high degree of originality.

A N D Q

3.2 Classification should take into account the time-bound nature of the work being protected (i.e. how rapidly the work may become out-of-date).

A N D Q

3.3 Classification should provide special categories. These might include:

A N D Q

3.31 audio visual materials;

A N D Q

3.32 computer programs;

A N D Q

3.33 tapes for transmission by wire or through the air.

A N D Q

3.4 Classification should separate works involving a single author or owner from a composite work which include several elements each owned by a different legal person or persons.

A N D Q

4. The term of protection should be reduced to the minimum allowed under Canada's international commitments. This would mean a 25-year limit instead of the present 50-year. Preferably the term of 25-years should date from the publication of the work and not the death of the author.

A N D Q

5. 5.1 Where a sum of money or any other consideration is required in return for the use of any copyright work the owner(s) should be required by law to state clearly and in writing either the kinds of use which are permissible or those which are not, or both.

5.2 Where a sum of money, or any other consideration, is required in return for the use of any copyright work the method of payment should be:

A N D Q

5.21 simple, direct and entail a minimum of difficulty for the ultimate user;

A N D Q

5.22 be reasonable and just.

(5)

COPYRIGHT AND EDUCATION IN CANADA

R. A. Morton - June, 1971

POSITIONS REPRESENTING CONSENSUS

The following positions represent unanimity or near unanimity among those Department of Education personnel responding to the ballot.

1. All published works should be available for legitimate educational purposes.

   1.1 . . .

   1.2 The owners of works published or produced in any form should, by law, state clearly, in writing, before the work is offered to the public what rights are being given in exchange for the required fee or other consideration. The statement should include specifically what the purchaser or lessee may or may not do with the particular item.

   1.3 Copyright law should include regulations having to do with the accessibility of works from other nations on terms consistent with international conventions to which Canada is a party.

2. The Copyright law should clearly define "fair dealing" or "fair use" as it applies to the use of protected works in educational institutions by students and teachers.

   2.1 Any basic definition should take into account the intention or the educational purpose for which the work is copied.

      2.11 . . .

   2.2 Any basic definition should take into account the circumstances under which copying within an educational institution might be considered to be fair, e.g.:

      2.21 when copies are made from works purchased or leased by the educational institution and normally stored within the institution in which instruction takes place;

      2.22 . . .

      2.23 . . .

      2.24 when copies are made within the same institution, school or building in which the instruction actually takes place;

      2.25 when the amount or proportion of a work is not substantial when related to the extent of the work as a whole.

POSITIONS REPRESENTING CONSENSUS CONTINUED

2.3 Similarly "fair dealing" or "fair use" must be defined in terms of performance of a protected work. "Performance" according to the present Copyright Act is defined as "any acoustic representation of a work, or any visual representation of any dramatic action in a work, including a representation made by a means of any mechanical instrument or by radio communication". Certainly this definition will be modernized to include performances through any kind of media, electromagnetic or otherwise.

2.31 Performances which should be considered fair should include:

2.311 a performance which is part of systematic instructional activities in any school or individual study, research, etc.;

2.312 . . .

2.313 . . .

2.32 Sound or video taping a performance live, or off the air, or off cable, and the replaying of that performance in whole or in part should be considered "fair dealing" or "fair use":

2.321 when it is used as part of systematic instructional activities in any school or institution provided that is erased within a specified time of its initial broadcast date.

2.322 when it is replayed for private or individual study, research, etc. provided that it is erased within a specified time of its initial broadcast date. Possession of a tape of performances beyond that date would be legal evidence of infringement unless an agreement to the contrary exists in writing.

2.4 Any basic definition should take into account financial or commercial implications particularly as they relate to:

2.41 whether the copying (or performance) of the work has or could result in financial gain for the copier or user;

2.42 whether the copying (or performance) of the work could result in a loss or potential financial loss to the owner;

5. 5.1 Where a sum of money or any other consideration is required in return for the use of any copyright work the owner(s) should be required by law to state clearly and in writing either the kinds of use which are permissible or those which are not, or both.

POSITIONS REPRESENTING CONSENSUS CONTINUED

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5. 5.1 Where a sum of money or any other consideration is required in return for the use of any copyright work the owner(s) should be required by law to state clearly and in writing either the kinds of use which are permissible or those which are not, or both.

POSITIONS MODIFIED OR EXPLAINED

The following position dealing with the application of any definition of "fair dealing" was generally approved but one or two serious questions were raised. The most serious was that the approach of suggesting a review board to keep regulations current would seem to be unwieldy and costly. Furthermore, the schedule of regulations would always be out-of-date.

The dilemma is essentially this. The Act should provide the basis for legal decisions and this basis should be general enough to remain valid for a comparatively long period of time. Regulations within the basic framework of the Act are more flexible and can be up-dated quickly to suit the changing need. However, the enforcement of a schedule of regulations probably requires a body such as a review board to bring together the views of all those who may be affected by any changes which might be made.

2.5 While the general definition of "fair dealing" or "fair use" should be set forth in the Act, application of any "fair dealing" or "fair use" definition should be governed by a schedule of regulations.

2.51 A permanent review board should be established to assist in keeping the regulations current and enforceable. Educators should be represented.

The entire section on classification is omitted because there is no consensus.

While most respondents approved number 4, having to do with the length of the term of protection, there was no consensus. I have added a sentence which might make it more acceptable.

4. The term of protection should be reduced to the minimum allowed under Canada's international commitments. This would mean a 25-year limit instead of the present 50-year. Preferably the term of 25 years should date from the publication of the work and not the death of the author. There should be an opportunity for renewing the term of protection for a further 25 year period

The method of payment position created problems for some. I have reworded it as follows:

5.2 Where a sum of money, or any other consideration, is required in return for the use of any copyright work not only should the sum or other consideration be reasonable and just but the method of payment should be simple, direct, and entail a minimum of difficulty for the ultimate user.

Relationship of Positions Outlined Above to Report of Economic Council of Canada

Position One - Accessibility

1. The Report recommends the removal of import barriers which would make foreign books more accessible to Canadian consumers.

2. The Report recommends the registration of all work to be protected. This at least would make it easier to search for the legal copyright owners.

Position Two - Fair Dealing and Fair Use

1. The Report adds a significant dimension to this problem by recognizing that the saving of time may be an acceptable economic justification for copying certain materials under certain circumstances.

2. The Report says . . . the copyright law should be widely known and seen to make sense and that its enforcement should rely neither on intensive and costly snooping - nor to any great degree on the detailed interpretation by non-experts of such a complex legal provision as even a clarified version of the "fair-dealing" exemption is bound to be in some cases.

3. The Report implies that authorities such as Departments of Education should take steps to see that copying in schools is not doing economic harm to owners of the rights.

   Specific mention is made of copying sheet music and videotaping educational films. The Report suggests that "they (Departments of Education) should issue directives and take other steps to keep it from happening".

4. The Report has something to say about "fair use" as it relates to computers and computerized information systems.

   The analogy is drawn between a library and a computerized information system. The library purchases single copies of works, catalogs them and places them on marked shelves. Material would be acquired by computerized information systems in much the same way, stored, and retrieved by the reader or researcher. When the computer delivers a work, in whole or in part, for a fee, two conditions must be met (a) the work is in its original form (or a protected adaptation) and (b) the medium of delivery (tape, printout, microfilm etc.) is more or less permanent and re-usable. If neither of these conditions obtain no fee would be charged.

   Because of the complications of computerized systems the Report suggests that problems be referred to an Advisory Committee.

5. The Report puts programs originated for cable transmission on the same basis as programs originated for broadcast transmission as far as the rights of authors, composers etc. are concerned.

6. The Report recommends an Advisory Committee of experts which would "study in depth particularly difficult copyright issues referred to it". It also recommends a Copyright Appeal Board constituted much as at present. The first of these bodies might function in a similar fashion as that outlined in position 2.5i.

Position 4 - Term of Protection

1. The Report strongly recommends no lengthening - nor shortening of the basic term of copyright in Canada.

Position 5 - Method of Payments

1. The Report states "The ownership of copyright should be easier to trace and the royalty more convenient to remit than is the case today".

2. In connection with metering copying devices the Report says, "It would be very difficult to enforce. Who would ensure, for instance, that many of the tens of thousands of metering devices had not been tampered with? How much more difficult still would be the enforcement problem when copying devices became (as some virtually are today) so small and cheap that almost anyone could own one? Should the law so operate as to restrain appreciably such technological advancement via miniaturization when this could be of great value for informational purposes, many of which are completely innocent?

"We would prefer a more positive and comprehensive solution, involving perhaps the development of some kind of intermediate, independent network facility for the fast and convenient delivery of non-infringing photocopies and other short-run, produced-to-order printed materials."

Still later the report says, "The aim should instead be to make both the law and the distributive system for copyright-protected materials such that the law may easily be complied with."

In conclusion the report makes this statement: ".... and a proliferating technology holds the promise of making the effective conveyance of messages from authors and others to the public very much cheaper and quicker. To realize this promise more fully, while making convenient, if sometimes comparatively novel, arrangements for a suitable return flow of income and incentives to further creative work, is the real crux of most copyright issues today."

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Re Report on Intellectual and Industrial Property

Economic Council of Canada - Recently Issued

1. Information which I received a month or so ago from a person in the publishing field that the Report would be "tougher" appears to be incorrect. e.g.

> "Copyright protection in Canada should not be fundamentally increased but only extended laterally to cover new media."

2. The Report has very little to say about education directly but its educational implications are considerable. In the introductory section on Information as a Commodity the words like "information", "knowledge" and "learning" are broadly defined and then linked in sentences such as the following:

> "Copyright is an incentive device - designed to elicit more of certain kinds of learning or knowledge creation and certain kinds of knowledge processing."
>
> And,
>
> "It is indeed an entire climate and environment that must be sought - an environment characterized by good access to information of all kinds, intellectual, curiosity, eagerness to learn, speculative thinking, experiment, enterprise and the entreprenourial spirit."

In the chapter devoted to Innovation, Information and Knowledge we find this sentence.

> "In order for its economy to grow and develop satisfactorily, a society must be innovative; to be innovative it must be well informed; to be well informed it must be good at the production, distribution and use of knowledge."

3. In a sense the report is a "majority" report and not unanimous. Labour leaders (Pepin and Macdonald) objected to the chapter on copyright as not recommending sufficient protection for members of performers' and writers' unions.

4. The chapter on copyright is summarized toward the end as follows:

> "Its specific recommendations for changes in the existing law are, however, relatively few. They include, notably, the development of the copyright registration system, the setting-up of a Copyright Advisory Committee, the reconstitution of the present Copyright Appeal Board, broader provision for the use and regulation of "copyright collectives" and the performing-rights-society approach to copyright enforcement, the removal from the present legislation of import barriers and of a potential (but a present inactive) secondary right in sound recordings, the provision of new broadcast and typography rights, and the specification of rights in certain kinds of computer output."

The concluding words of the chapter are:

> "They (creative Canadians) have a larger, more literate and better-educated public with which to communicate; a rise of national consciousness has helped to bring about a fresh growth of interest in the Canadian past, present and future; and a proliferating technology holds the promise of making the effective conveyance of messages from authors and others to the public very much cheaper and quicker. To realize this promise more fully, while making convenient, if sometimes comparatively novel, arrangements for a suitable return flow of income and incentives to further creative work, is the real crux of most copyright issues today."

5. If recommendations of the Economic Council were to be enacted into law implications for education might include the following:

   a. Copyright material from outside Canada should be more accessible and perhaps lower in cost. Incentive for more Canadian-produced materials should be provided in ways other than excessive copyright protection. About publishing, the Report states:

      > "There are certain vital things which a Canadian publishing industry can do that no foreign counterpart is likely to do. These include the early nurture of Canadian authors not yet ready for the big international markets, the generation of textbooks and other teaching materials for courses where Canadian content is a prime educational requirement, and the production for a more general readership of such works as Canadian histories and biographies which are much in demand domestically but enjoy little sale abroad."

      However, the report is not clear how a viable Canadian publishing industry can be supported to do what it suggests.

   b. All copyright materials would be registered making it easier to trace owners and prove infringement. Presumably authors, producers etc. would register only materials which might be sold in commercial quantities. It is possible that certain scholarly material with limited revenue potential would not be registered and therefore not protected.

   c. The term of copyright protection would remain at 50 years. This, it seems to me, prolongs the nuisance of searching for holders of rights and paying fees far beyond the point where real benefits can accrue to the actual writer or performer or surviving dependents.

   d. An Advisory Committee and an Appeal Board could presumably deal with specific applications of the law such as that related to education. However, it could provide further opportunities for Federal-Provincial confrontations.

   e. The Report recommends that the performing-rights-society approach be extended. This means that a certain class of creative person - writer, performer etc. - assign all rights to an association and collect royalties etc. through the association. Through existing professional

associations teachers and university professors could deal with their rights in educational television, film, audio visual recordings etc. In this way fee structures and the payment of fees might be standardized.

f. While the Report seems to be a "soft" document it does suggest that in cases of proven infringement penalties be increased. It also notes that infringement cases should be "processed with more dispatch and at lower cost". It seems clear that when a new Copyright Act is enacted many firms now suffering from blatant copyright infringements will take action. Because many of these are by schools and institutions they can be expected to be the object of suits soon after the law is proclaimed.

g. The Report acknowledges that the rights inherent in certain intellectual and artistic properties are not very clear and should be specified in any new law. It seems important that this clarification should extend to specified uses within educational institutions.

h. The Report takes into consideration what are called "neighboring rights". These are involved when several groups are participants in the process of producing a work: broadcasters, sound recorders, publishers, and performers. The Report recommends that broadcasters (CBC, CTV etc.) should be protected against unlawful use of tape recorded broadcasts by producers of audio visual records (EVR etc.) and conversely be able to derive their share of revenue from the sale of such records. Similarly a cable operator recording a live program for transmission at a later time would have to negotiate with the broadcaster. For those provinces producing educational programs there is a possible source of revenue involved, for those who are essentially consumers there might be additional costs to consider.

i. The Report indicates that while broadcasters may collect for re-use of programs, performers etc. should not collect separately. In other words broadcasters should either buy out rights from performers, composers etc. or provide for means of paying residuals within the terms of the original contract. The Report says:

> "We conclude that a proliferation or a "layering" of secondary performing rights would be of dubious social benefit and that a performer's control of re-use of his performance should by and large be settled by private contractual arrangements between himself and the holder or assignee of the primary rights.

j. The Report does not look upon copying machines with the same apprehension as most publishers. Some clarification of "fair dealing" is recommended but otherwise the Report suggests no revisions be made to copyright law specifically affecting copying machines. The Report notes that copying is a time saver and does not imply a flagrant disregard for other peoples' property. Setting aside any complicated system of licensing of equipment and collections the Report states:

"We would prefer a more positive and comprehensive solution, involving perhaps the development of some kind of intermediate, independent network facility for the fast and convenient delivery of non-infringing photocopies and other short-run, produced-to-order printed materials."

Later in the same section two statements of interest to educators are made.

"The aim should instead be to make both the law and the distributive system for copyright-protected materials such that the law may easily be complied with."

Referring to infringement of copyright by schools the Report states:

"But one would think that provincial departments of education could readily see how destructive this type of practice is and why they should issue directives and take other steps to keep it from happening. If it is permitted to occur on a substantial scale, it is likely to drive out of business some Canadian sheet-music publishers who rely heavily on the educational market and to persuade some Canadian educational film-makers that they should shift resources into some other field such as the making of television commercials. Such a result would hardly tend to advance Canadian education."

k. The Report considers certain aspects of computers and computerized information systems as not basically different from current library services. Works are bought and placed on "memory shelves". The output of computers when it involves originality and is in a form which can be re-used would be subject to royalty. The Report states:

"In the long run, liberal access to information seems to serve a democratic society best."

l. The Report notes that courts have placed cable television in a different position broadcasting in the wireless sense. The Report feels that this is no longer justified, at lease for all cases. It states:

"The law should ensure that producers of programs for direct transmission by cable are in the same copyright position and have the same responsibilities towards authors, composers, etc., as those who produce programs for wireless transmission. The direct line of responsibility to the author or other copyright owner should go from the program-originator, who may sometimes be the cable operator himself and sometimes an outside contractor."

This is significant in that educators may be originators of large numbers of programs and therefore responsible for payment of fees and residuals on the same basis as are now done for broadcast purposes.

(8)

Draft For Discussion

A POSITION PAPER FOR

THE

COUNCIL OF MINISTERS OF EDUCATION, CANADA

1. A STATEMENT OF THE PROBLEM

The Canadian Copyright Act has not yet been adapted to apply rationally to media developments of the last 50 years. Revision of our copyright law is needed in the light of the new educational technology which includes such devices as radio, television, electronic computer systems, and photographic, electrostatic, and electromagnetic copying techniques, etc. This new media has the potential to radically alter the educational process. It can expose students to experiences which go far beyond the confines of the classroom.

A gradual movement from the text authority oriented curriculum to the more open and experimental approach is already apparent. This change, however, greatly increases the range of materials and presentation devices required to furnish effective educational experiences. Yet the educator is inhibited, at present, from full use of this technology by the restrictions placed on the materials. These restrictions are placed on the materials to protect the copyright owner. However, even this protection is becoming ineffective due to the great quantity and extensive use of reproducing equipment.

The current Copyright Act is cumbersome, unclear, inhibitive and ineffective. The law must be revised to correct the glaring inadequacies within it. Solutions that can effectively deal with the present and future needs of all interested parties - the creator, the distributor, and the educator - must be innovated. These remedies must be simple, clear and satisfactory to all those who are affected by them. Thus, it is in this context that the Council of Ministers of Education, Canada offers various proposals for the reform of our Copyright Act.

2. SPECIAL TREATMENT

Education should be classified as a special area in the use and re-use of materials which are subject to copyright restrictions. This is not to say that educational establishments should be exempt from the copyright law, but merely that they are entitled to special treatment. This entitlement stem from the fact that the educational institution is a non-profit organization which is heavily encouraged by public funds. Futhermore, educational users of copyrighted material form a easily defined group and operate in a controlled environment. Thus, there should be a distinction between an educational authority and a commercial user of copyright material.

For example, special treatment for educational purposes might include material used by instructors within ordinary non-commercial educational instruction. This material could be distributed in any manner for classroom reception.

3. CLARIFICATION

The educator needs clarification of his legal position regarding copyright. Most teachers are interpreting the law according to their particular point of view. This is understandable because either they are unaware of the law or "the law which they are aware of is so vague that the broadest, most generous interpretation is invariably assumed."[1] Therefore, the law should make it mandatory that the owner of copyright material clearly state at the time of purchase, exactly what the purchaser's rights are, what uses are legitimate and under what conditions. The copyright owner should also clarify what constitutes an infringements of his rights under the law. Occasionally this is done now, but usually in small print and in ambigious language.

Critical concepts should also be clearly defined. Some examples are:

i) Subject matter of copyright should be defined as " any original work so recorded that it is capable of being reviewed, communicated or heard again essentially in its original form."[2]

ii) Publication is another important concept but one that is designed for graphic arts distribution. "It is differentiated in law from performance, with the result that a heavily taped program may remain legally unpublished, and protected, even after copyright has expired on the printed study guide which accompanies it..... To help adapt the concept to audio-visual works, for example, the current definition of "publication" should be clarified to include general rental, lease or lending of copies, as well as sale, to that part of the public relevant for a particular work. Such a definition would also cover current practice in the distribution of orchestral scores. Storage of a work, such as an otherwise unpublished thesis, in a computer or library for general use should constitute publication."[3]

(3)

iii) "Fair use" must be clarified as it pertains to education. A general statement of the "fair use" doctrine without more, has proven to be generally unworkable in practice. Specificity is required for this principle to operate satisfactorily. Specific guidelines should be developed to ensure clarity in any revision of the law. For example:

a) "Fair use" with respect to study and research should be extended to include the employment of audio-visual works and computers.

b) "The law now permits a single copy of material to be made for purposes of individual study. It is clear that teachers could legally make copies of any material for which copying privileges have been secured in writing by them or the authorities by which they are employed. This could take the form of a contract or an exchange of letters.

However, in addition teachers might be given the right to make copies of <u>any</u> material without charge provided that

1. copies are made within the same institution, school or building, in which the instruction takes place
2. copies are made only to the number of students taking instruction under particular teachers
3. copies are not stored or retained for re-use after they are used in any particular instructional sequence. Storage of copies would be evidence of infringement
4. copies are made from sources (books, magazines, tapes, films) owned by the institution and normally stored within the institution in which instruction takes place.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
The above are suggestions as to the type of qualifications which might be made."

c) A permanent review board should be established to con[illegible]ally revise the definition of "fair use" and its regulations. In a brief to the Economic Council of Canada, the Canadian Association of University Teachers and the

Ontario Universities' Television Council suggested that the board control the following functions:

1. "performance of the existing functions of the Copyright Appeal Board;
2. power to make rulings respecting the copyright status of technological developments which occur after the passage of new legislation;
3. power to exempt special temporary nonprofit activities;
4. authority to conduct studies and research on any aspect of copyright law or its administration."

Educators should be aware of the aforementioned brief's approach to the clarification of the "fair use" doctrine. The following excerpts reveal the brief's policy recommendations:

"Fir[illegible] the scope of the fair dealing defence, toge[illegible]r with the main criteria relevant to the ques[illegible]n of fairness, should be enacted in stat[illegible]ory form.....Solution in the form of specific regul[illegible]tion is not without disadvantages, but these are [illegible]re than outweighed by the benefits. It has the great advantage of securing specificity and reasonable flexibility at the same time. By appropriate classification of materials, users and purposes, and by reference to available economic and copying data, the regulation could arrive at workable solutions..... A regulation can be amended more easily than a statute. Situations not covered by the regulation would fall to the general statutory statement for solution, but any interested party could request that the regulation be amended to cover a particular area. Preference for particular solutions negotiated by all interested parties could be effected by requiring the administrative agency to enact any such agreement.....The general criteria relevant to the question of fairness should receive enactment in more permanent statutory form. Effect of the use upon the commercial position or potential of the original is the most important criterion. Others mentioned from time to time by the courts include the type of use, spontaneity of the copying, number of copies, intent of user, benefit derived by the user, amount of labour required by the user, nature

of the work, quantity and relative value of the part reproduced, and its relation to any new work produced. It is important that no one criterion be regarded as having controlling significance. Each situation must depend, as under existing law, on all relevant circumstances."

Educators should give this method of clarifying the "fair use" principle earnest thought.

4. ACCESSIBILITY AND DISTRIBUTION

The Canadian Copyright Act, as it now stands, is fairly restrictive. Technological advances have made information accessible, easy to copy and store in whatever form seems most effective and practical. Yet to secure the use of this material, the educator is generally faced with a complex system of unjust and unworkable regulations as well as time-consuming and costly procedures. Past experience has shown that the protection afforded copyright materials has in some instances prevented their use for educational purposes or in other instances made the costs prohibitive. Furthermore, educational requirements for such equipment as audio-visual, etc. are generally felt to be unsatisfactory. Time and again, instructors use materials because they are the only ones available or because they approximate most closely to the teaching needs. Thus, for teachers to improve the quality of their instruction:

i) All materials in whatever form must be available and accessible. Educators should not be denied access to any source of knowledge. "The law should make it mandatory that the owner of any material - print or non-print - make such material available for purposes of study (instruction, education)."

ii) "The law should make it mandatory that owners of materials clearly state at the time that the item is purchased what the purchaser may or may not do with the particular item."

iii) "Copying privileges should be available for all materials, taking into consideration the law and the terms set by the owners of the intellectual or artistic property."

iv) Educational television improves the quality of existing instructional methods by providing

educational experiences well beyond those possible under normal school conditions. However, educators are inhibited from the use of such programs under the present copyright law. It is significant to note that educational institutions can control videotaping and playback. Furthermore, the employment of such programs within a closed situation does not injure the financial compensations due to the publisher or creator. Educational users should have access to CBC and CTV program material either by permission to videotape or by making film material available.

v) Canadian copyright law should include regulations for the international accessibility and distribution of intellectual properties.

5. CLASSIFICATION

The most important distinction, which has been previously mentioned, is made between the educational authority and the user of copyright material, the public educational enterpriser and that of a purley commercial nature.

Copying practices which are necessary for proper instruction, and which can be used freely without a harmful effect upon the vital source of creative materials should be classified. A system of compensation should be developed to adequately reward the copyright owner for these copying privileges. "The law must take into account the technical possibility of all types of copying - photographic, electrostatic, electromagnetic etc., all types of distribution including herzian waves and cable, and all types of display including printed sheets of paper, bound printed sheets, cathode ray tubes, screens, etc."[9]

Some materials have a "time-bound" quality. They may be relevant now and for a short time into the future, but they rapidly lose their importance because a particular set of circumstances may alter or cease to exist. These "time-bound" materials should be classified differently from those which will be in demand for several years.

The nature of the material expressed in the various types of media offers a basis for classification. Information cannot be copyrighted, only the manner in which the information is expressed or presented. The creator adds something original and unique to the bare facts which gives

his work a value beyond the information itself. Materials which are merely statements of factual data, whether verbal or pictorial, should be considered in a different light from those which are highly ingenious and creative.

As a result of the technological advances over the last half century, new forms of expression have been invented which are not definitely identified in our present copyright law. These should be classified specially. For instance:

i) Audio-visual materials should be listed specifically. Video-tape and film would be put on an equal basis.

ii) Computer programs should also be classified specifically. Only the form of expression, not the functional goal would be protected.

iii) Performances and broadcasts in which copyrighted portions are arranged in an original manner should themselves be protected by copyright.

6. TERM OF PROTECTION

The term of copyright protection should be reduced to the minimum allowed under Canada's international commitments. This would mean a 25-year limit on copyrighted material instead of the present 50-year. Preferably, the term of 25 years should date from the creation (or publication) of the work and not from the death of the author.

There are three basic reasons for this policy.

i) Since a cost - benefit analysis is impossible and since evidence concerning the correlation between the length of the copyright term and the quantity of new material produced by additional protection and incentive is lacking one way or the other, the presumption ought to favour the shorter term.

ii) The number and types of users of copyright material have increased measurably with the result that the total amount of compensation due the owner has also substantially increased. Consequently, the statutorily secured incentive period of 50 years, which was established almost half a century ago, no longer offers an equitable assessment of the modern situation.

iii) In a rapidly progressing society materials quickly become outdated. Very few works remain in constant use for more than two decades. A 50-year term only frustrates occasional users of older material.

7. PAYMENTS

The methods of permission and payment for copyrighted material are outdated, restrictive and cumbersome under our present law. Maximum access to works is essential for the effective operation of our educational process. Too often, this access is obstructed by delays in obtaining copyright clearance and the complications of payment.

Payment procedures should be as simple as possible to administer and collect. They should also be reasonable and just. The educational user of copyrighted material should understand exactly what his rights are when he makes his purchase. For example, permission for him to copy/duplicate/transcribe (perhaps within certain time limits) should be explicitly stated. If he wishes to go beyond the stated limits, the copyright owner should indicate the additional fees required and the payment procedures. This would allow the educator to predict in advance and thus regulate the costs incurred in using copyrighted materials. The method of payment ... be in the form of a scale of fees for single and multiple copying. "Preferential rates should exist for such educational users as instructional television or private research, as distinguished public television or commercial research. A general distinction between closed circuit and open broadcast transmission would be feasible for the use of appropriate materials. Non-profit libraries should also receive a special rate."

These measures would add clarity and simplicity to the complicated and cumbersome payment procedures.

It is significant for educators to note that various organizations have proposed that copying be controlled by a licencing system. In a brief to the Economic Council of Canada, the Canadian Association of University Teachers and the Ontario Universities' Television Council recommended that compulsory licence provisions be expanded to include, at least for the purposes of education, all materials published or revealed indiscriminately to the public, but not otherwise available to educators - in other words, compulsory permission without payment. A clearing house technique, done through a permanent agency created by statute, would have to be established to deal with this. Rules

relating to the rate structure and to entitlement of compulsory licence would have to be created. The Teachers' Associations felt that this method "is the only tolerable way in which both convenient and full use (of copyright material) can be achieved and payment to the copyright owner achieved." Further investigation into all the various implications of such a payment technique should be made by educators.

8. ENFORCEMENT

As a result of the vagueness and ambiguity in our present Copyright Act, educators are often interpreting the law from their particular point of view. While ignorance of the law is no excuse when it comes to enforcement, it is understandable especially under the vague terms of the current Copyright Act. Therefore, innocent teachers should be relieved from copyright infringement damages.

The copyright law clearly state its terms, so that compliance with these terms is as simple as possible to follow and enforce. Every category of violation should be clarified so that there is as little ambiguity as possible when the terms of the law are applied to any particular situation. Specific provisions could also be formulated to enforce the terms of the law. For instance, the authorization for the installment of copying/duplicating/transcribing equipment in educational institutions should carry with it responsibilty for the supervision and control of the use to copy/duplicate/transcribe. This control is necessarky to guard against damage to the interests of the creator and publisher and to re-imburse copyright owners for the use made of their materials.

Until the Copyright Act is revised, interim policies should be followed by educators. Educational institutions should take every reasonable precaution in the use and re-use of material which may be protected by copyright. Future negoiations between educators and copyright owners biased by flagrant infringement of the law, even though the possibilities of a lawsuit are small. "Departments of Education should formulate a general statement to school administrations within provincial jurisdiction related to uses of copyright materials which are patently violations of existing copyright law without prejudicing any future stand which might be taken which may advocate substantial changes in the existing copyright law."

CONCLUSION

The greatest possible relaxtion of the copyright law, consistant with the reasonable rights of creators and publishers, would serve educational goals. So far as future trends are concerned, copyright law revision ought to take place on the assumption that anything foreseeable is possible. The copyright position taken by educators should allow for effective and responsible use of technology in education. Solutions should be as flexible as reasonably possible, in order to facilitate the dynamic features of both technological and educational processes. At the same time, they should be straightforward and simple to apply in practice.

FOOTNOTES

1. Article entitled "Copyright and Instructional Media In Canada," page 4.

2. Brief to the Economic Council of Canada by the Canadian Association of University Teachers and the Ontario Universities' Television Council, page 19.

3. ibid, pages 35 & 36.

4. Excerpts from a letter written by Mr. Morton, July 13/70.

5. ibid.

6. ibid.

7. ibid.

8. ibid.

9. Reasons suggested by the Canadian Association of University Teachers and the Ontario Universities' Television Council, in a brief to the Economic Council of Canada, page23.

10. ibid, page 29.

11. Article entitled "Copyright and Instructional Media In Canada," page 18.

(9)

LES DROITS D'AUTEUR ET L'EDUCATION

Note préliminaire

Le présent document ne doit pas être considéré comme une étude exhaustive du problème. Il ne contient que des commentaires sur un document de travail intitulé "A position paper for the Council of Ministers of Education Canada", document qui doit être présenté les 20-21 septembre 1971.

1. Appréciation générale

Ce document de travail établit un diagnostic sérieux sur le problème posé par l'actuelle législation régissant les droits d'auteur en regard des exigences modernes de l'éducation. Il est évident que la loi doit être refondue. Il faut protéger davantage la propriété intellectuelle et assurer aux producteurs les bénéfices auxquels ils ont droit; cependant, le droit à l'éducation et à l'information ne doit pas être entravé par des considérations prioritairement commerciales. En cette matière, l'éducation doit jouir d'un traitement de faveur.

Le document étudié n'arrive pas à exprimer clairement, sinon au niveau des principes, comment peuvent être conciliées les exigences du droit d'auteur avec celles de l'éducation. Le troisième point contient toutefois des définitions qui permettraient de rendre la loi plus précise.

L'idée de catégoriser les droits d'auteur suivant la nature des documents représente une proposition réaliste. Les auteurs du document de travail auraient pu néanmoins être plus rigoureux dans la présentation des catégories et donner un meilleur aperçu du système de classification des droits d'auteur.

Les procédures de paiement des royalties doivent être d'une très grande simplicité. Les tolérances accordées aux milieux d'éducation devraient plutôt être inscrites dans la loi ou dans des règlements; si des redevances doivent être versées, il serait préférable que le contrôle du respect du droit d'auteur soit confié à l'administration scolaire et non aux enseignants ou aux étudiants.

2. Précisions de la loi ou de l'auteur

Certains passages du document laissent croire que la loi devrait obliger les auteurs à indiquer les droits que ceux-ci concèdent aux acheteurs et ce qui constitue une violation de leurs droits.

- "Therefore, the law should make mandatory that the owner of copyright material clearly state at the time of purchase, exactly what the purchaser's rights are, what uses are legitimate and under what conditions. The copyright owner should also clarify, what constitutes an infringements of his rights under the law. (p.2)

- "The law should make it mandatory that owners of material clearly state at the time that the item is purchased what the purchaser may or may not do with the particular item." (p. 5)

- "The educational user of copyright material should understand exactly what his rights are when he makes his purchase. For example, permission

for him to copy a duplicate à transcribe (perhaps within certain time limits) should be explicitly stated. If he wishes to go beyond the stated limits, the copyright owner should indicate the additional fees required and the payment procedures." (p. 8)

Si l'on veut dire par là que le propriétaire de droits d'auteur est obligé d'indiquer sur chaque document le contenu de la loi s'appliquent à la catégorie à laquelle appartient son oeuvre, il n'y a pas d'objection. Mais si on laisse entendre que chaque propriétaire doit formuler lui-même les droits qu'il concède, même en conformité avec la loi, je trouverais cette proposition non-praticable, tendancieuse et compromettante. La loi actuelle est difficile à appliquer et je n'ose penser à ce qui se passerait si on devait tenir compte des points de vue particuliers des auteurs dans la qualification de leurs droits.

3. Refonte de la loi

Le document de travail soutient les principes généraux sur lesquels devrait s'appuyer la nouvelle loi:

- "Education should be classified as a special area in the use and re-use of materials which are subject to copyright restrictions" (p.1)

- "These remedies must be simple, clear and satisfactory to all those who are affected by them." (p.1) Il faudra donc, en premier lieu, comme le suggère le troisième point (clarification), que la loi contienne des définitions claires et applicables: "Critical concepts should also be clearly defined." (p.2)

- Le droit de propriété intellectuelle ne doit pas affecter le droit à l'information et à l'éducation comme le suggère le quatrième point: "Accessibility and distribution." (pp. 5-6)

- "The nature of the material expressed in the various types of media offers a basis for classification". (p.6) Les grandes catégories devraient figurer dans la loi ainsi que les droits spécifiques des auteurs et des acheteurs pour chacune des catégories. Un article devrait obliger l'auteur à publier avec son oeuvre les droits qu'accorde la loi.

- "The term of copyright protection should be reduced to... 25 years... from the creation (or publication) of the work." (p.7)

- "Payment procedures should be as simple as possible to administer and collect. They should also be reasonable and just." (p.8)

- "Canadian copyright law should include regulations for the international accessibility and distribution of intellectual properties." (p.6)

Office canadien des droits d'auteurs

La loi devrait en même temps créer un organisme canadien qui aurait notamment les responsabilités suivantes:

- Voir à l'application de la loi; recueillir les critiques des producteurs et des acheteurs de matériel couvert par le "copyright"; faire l'étude des amendements à la loi.

- formuler la réglementation qui explicitera la loi et en facilitera l'application; mettre en oeuvre les structures requises en vue d'une protection adéquate des

privilèges et des droits accordés; procéder à la révision des règlements.

- Administrer l'inscription et le paiement des droits d'auteur: les permis accordés à l'éducation.

A mon avis, il serait nécessaire qu'il y ait une personne de langue française à la direction de cet Office, car la situation du marché francophone au Canada contient des particularités exigeant une attention spéciale.

Il conviendrait d'ajouter à cette Office un Comité consultatif formé de représentants du monde des affaires, de l'éducation et des gouvernements provinciaux et fédéral.

Mes réflexions sur cet Office et ce Comité consultatif sont très incomplètes. Il m'apparaît cependant impossible de rendre une loi opérationnelle si aucun organisme n'a la responsabilité de voir à son application. En attendant que la loi soit refondue, le Conseil des ministres de l'Education devrait former un Comité ad hoc pour voir à protéger les intérêts de

l'éducation dans cette opération de mise à jour.

Roland Marquette
Direction générale de la Planification
Ministère de l'Education

Québec, le 15 septembre 1971.

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1. MINISTERE EDUCATION

2. TITRE DU DOSSIER DROITS D'AUTEURS

3. CATEGORIE: INTERPROVINCIAL [X] FEDERAL-PROVINCIAL [X] INTERNATIONAL [X]

4. AUTRES MINISTERES OU ORGANISMES IMPLIQUES
   - A QUEBEC Ministères des Affaires Culturelles; Industrie et Commerce; Communications
   - A OTTAWA Secrétariat d'Etat
   - AILLEURS

5. FICHE COMPLETEE LE 10 novembre 1971
   PAR Claude Marin

6. FICHE REVISEE LE 10 novembre 1971
   PAR
   LE
   PAR
   LE
   PAR

LES DROITS D'AUTEURS

1. **Historique:**

Le "Canadian Copyright Act" n'a connu aucune mise à jour, ni adaptation aux changements qui sont survenus au cours des 50 dernières années. La révision de cette loi devient impérieuse à la lumière surtout des développements et des situations nouvelles qui ont été occasionnés par l'introduction des moyens technologiques d'enseignement.

Le gouvernement fédéral a entrepris d'apporter des amendements à la Loi Canadienne des Droits d'Auteurs et a consulté à cette fin le Conseil des Ministres de l'Education du Canada. Le secrétariat du Conseil a préparé un "Position Paper for the Council of Ministers of Education Canada" qui a été déposé, à titre d'information à sa réunion des 20 et 21 septembre 1971.

2. **Problématique actuelle:**

Le ministère de l'Education du Québec a préparé un document (DGEP-RM) contenant des commentaires préliminaires au sujet du "position paper" du Conseil des Ministres de l'Education.

Ce document constate "qu'il faut protéger davantage la propriété intellectuelle et assurer aux producteurs les bénéfices auxquels ils ont droit; mais que le droit à l'éducation et à l'information ne doit pas être entravé par des considérations prioritairement commerciales; et que l'éducation doit jouir, en cette matière d'un traitement de faveur"

Ce document traite aussi de certains principes et orientations qui devraient être inscrits dans la Loi. Il propose finalement que l'on s'arrête à la question de la création d'un Office canadien des droits d'auteurs qui aurait à rendre opérationnels les articles d'une nouvelle loi.

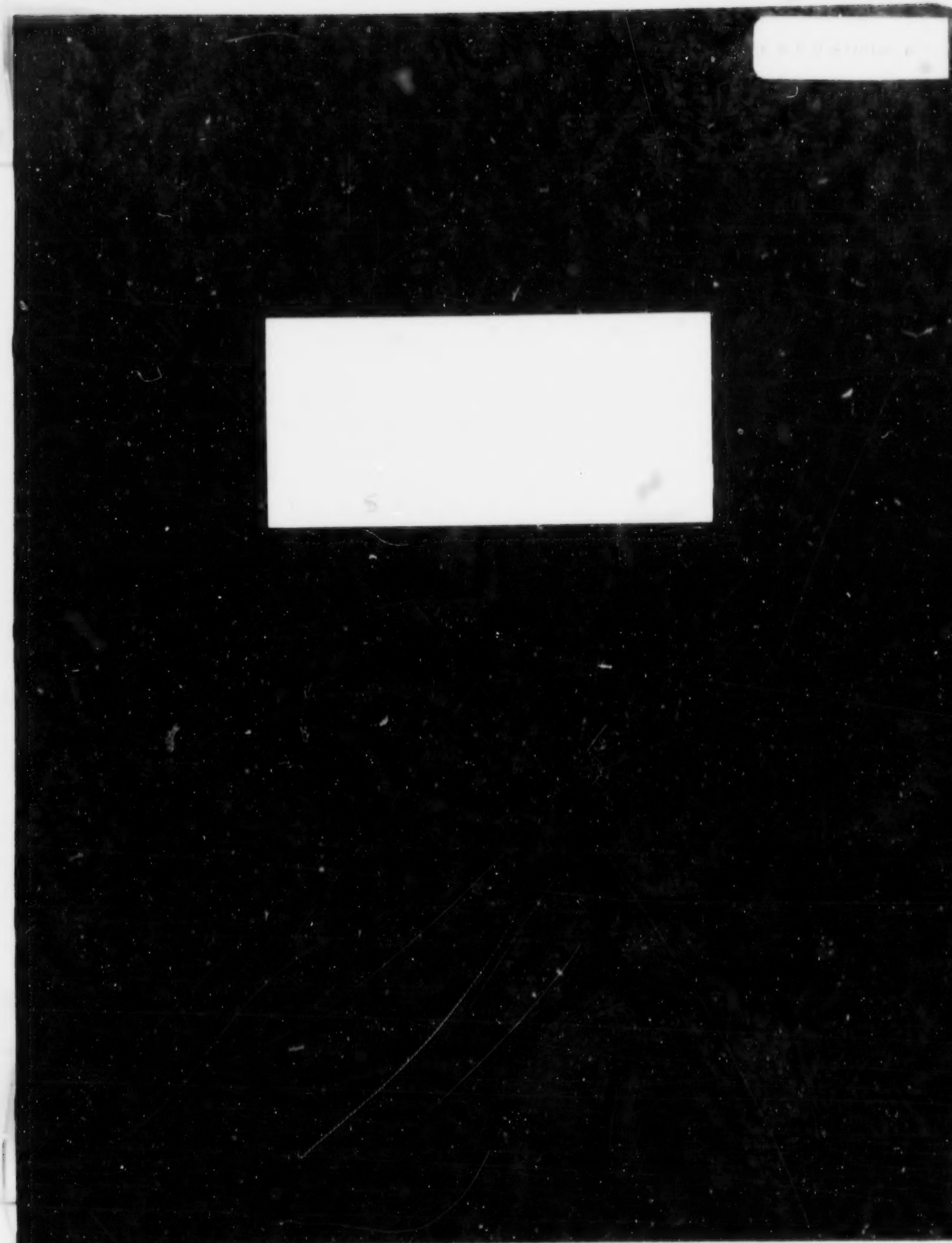
2...

et à celle du rattachement à cet Office d'un Comité Consultatif formé de représentants du monde des affaires, de l'éducation et des gouvernements provinciaux et fédéral.

Les réflexions demeurent cependant incomplètes, à l'heure actuelle, sur cette question.

3. **Bilan:** Neutre

4. **Recommandations:** En vue de la refonte de la Loi et dans le but d'exercer une influence sur son élaboration, il pourrait être proposé que le Conseil des Ministres de l'Education du Canada charge un comité ad hoc de l'étude de cette question sous l'angle de l'éducation et de la formulation des recommandations appropriées.



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DOCUMENTATION SUR LE DROIT D'AUTEUR

3

DOCUMENTS DIVERS
concernant la revision de la loi du droit d'auteur aux Etats-Unis
dans leur ordre chronologique

Documents compilés par Robert Moore
S.G.M.E.

février 1973

DOCUMENTS DIVERS CONCERNANT LA REVISION DE LA LOI DU DROIT D'AUTEUR AUX ETATS-UNIS DANS LEUR ORDRE CHRONOLOGIQUE.

1. Harry N. Rosenfield, Education and the Copyright Law. Remarks before National Association of Educational Broadcasters, October 28, 1964. - Commentaires sur les projets de loi S. 3008 et H.R. 11947, présentés en juillet 1964.

2. Major Provisions of Copyright Legislation et The Implications of the New Copyright Bill for the Classroom Teacher", textes émanant probablement de la National Education Association. Commentaires sur les projets de loi S. 1006 et H.R. 4347, introduit au congrès le 5 février 1965.

3. Fred S. Siebert, Use of Copyrighted Material for Instruction through Inter-Institutional Distribution by the Television, octobre 1966, ED 023 302. Commentaires sur les projets de loi S. 1006 et H.R. 4347.

4. Harold E. Wigren, Fact Sheet on Copyright Law Revision, au sujet des projets de loi S. 597 et H.R. 2512 du 90e congrès (1967).

5. Eugene N. Aleinikoff, Educational Television - a non-commercial Viewpoint, février 1968, au sujet du projet H.R. 2512.

6. Harry N. Rosenfield, Major Problems of Copyright Law as Viewed by the Ad Hoc Committee on Copyright Law Revision, 1er novembre 1968.

7. Fred S. Siebert, Proposed Copyright Law Will Affect Education, Eté 1968 (extrait)

8. Doris M. Timpano, Copyright Legislation and You, April 1969, Commentaires au sujet des projets de loi S. 543 et H.R. 2512.

.../2

9. Barbara A. Ringer, Copyright Law Revision and ETV, March 1969.

10. Lettre de Harold E. Wigren, à M. Arthur H. Rice, faisant le point sur la question, 12 octobre 1972.

11. Texte de la National Education Association, consistant en une nouvelle proposition en faveur de l'éducation, novembre 1972.

EDUCATION AND THE COPYRIGHT LAW

Remarks by
HARRY N. ROSENFIELD, Esq.,
Washington, D.C.

- - - - -

Before
National Association of Educational Broadcasters
40th Annual Convention
Austin, Texas
October 28, 1964

Judicial decisions are customarily published with what is called "headnotes", or summary of the decision. The idea strikes me as a good one for the present purpose, and I should like to start my remarks with a sort of headnote summary, as follows:

1. Current official proposals to amend the copyright law will seriously hamper education by repealing a long-standing statutory exemption for education.

2. A new copyright law should provide special recognition to education enabling nonprofit, noncommercial educational institutions and organizations to make limited use and copies of copyrighted materials.

3.

law, allowing as a defense in a suit for infringement a claim that some use is permissible "fair use."

Proposed Law Repeals Educational Exemption

In July of this year, S.3008-H.R.11947 were introduced as a proposed revision of the copyright law. What does this bill do to the above-noted aspects of the present copyright law?

First, it would repeal the present automatic educational exemption provided by the "for profit" clause. It would substitute a totally new and untested provision which would permit

> "(1) performance or exhibition of the work by instructors or pupils in the course of face-to-face teaching activities;
>
> (2) performance or exhibition of the work by or in the course of a broadcast or other transmission made for reception solely within nonprofit educational institutions; . . ."

The first-cited provision would impoverish the educational system of America by depriving teachers of the present law's exemptions for education, thereby for all practical purposes barring many tried and effective classroom teaching techniques and media. The proposed "face-to-face" restriction would limit prevalent practices in progressive and efficient American schools and would curtail education's opportunity to use modern technological developments in schools.

In 1961 the report of the Register of Copyrights to Congress recommended retention of the present "for profit" provision, and

3. Educational broadcasting is an integral part of the educational process, and should not be discriminated against in the copyright law.

4. Congress should enact the proposals of the AD HOC COMMITTEE ON COPYRIGHT LAW REVISION which would preserve and perfect the long-standing education exemption of the present copyright law.

Present Copyright Law Provides Exemption for Education

Under present copyright law, dating back to 1909, there are two legal bases for education's use of copyrighted materials:

First, the "for profit" provision, wherein Congress has long stated a basic public policy that education shall have an absolute and automatic exemption from copyright law to make certain uses of specified types of copyright materials. Thus, for example, the nation's public and private schools may perform (in classrooms, through educational broadcasting, in auditoria, on field trips, and otherwise) copyrighted historical, poetical and musical materials, so long as such material is not dramatized and such performance is not "for profit."

Second, the doctrine of "fair use", which is not in the copyright statute itself but which the courts have read into the

law, allowing as a defense in a suit for infringement a claim that some use is permissible "fair use."

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In 1961 the report of the Register of Copyrights to Congress recommended retention of the present "for profit" provision, and

therefore of the present statutory exemption for education, as striking "a sound balance between the interests of the copyright owners and those of the public." (p.27). However, the proposed bill radically changes both that report and the present and long-standing law by destroying this "sound balance" in a way that could be disastrous to education. The bills threaten the whole range of tested and widely-used educational practices and patterns based on various audio- and visual- developments as well as other modern technological advances. For example, use of transparencies for overhead projection would be denied to teachers under the new bill, as would similar modern aides to effective classroom teaching. And, I might add, a substantial number of the items thus denied to teachers have been developed, and huge sums of public money expended, in reliance upon practices and patterns which grew up under the present copyright law.

Second, instead of the present law's educational exemption which covers all educational broadcasting, the proposed bill would be limited only to closed-circuit educational broadcasting. Under the proposed bill, apart from the uncertainties of "fair use", neither non-campus educational radio nor open circuit ETV could legally use live any copyrighted material without first obtaining copyright clearance and paying royalties. This is a revolutionary reversal from present copyright law. And the theory behind it opens educational broadcasting to further and later discriminatio

The current copyright law treats educational broadcasting as education, and does not distinguish between educational broadcasting and any other means or media used by educators in the teaching process. But the proposed bill would relegate all this to the ash heap of history.

But this is not all. Under the present law there is unresolved uncertainty whether educational broadcasters may legally prerecord broadcasts for later use; nevertheless, such prerecording is a common practice, and one that has not yet been successfully challenged in the courts. And to the extent that it is not now prevalent, prerecording is becoming a "must" for all effective noncommercial ETV. The proposed bill clearly bars any such prerecording for a delayed broadcast, even by a closed circuit educational broadcaster. If a school with closed circuit ETV wishes to give the same lesson to all the scheduled classes in a high-registration course, throughout the week, instead of putting the program on tape for later broadcast to the other classes, it would be required by the proposed bill to repeat the program <u>live each time</u>. I respectfully submit that this does not make sense. Nor does it make sense for schools or universities to be prevented from recording programs by outstanding teachers or lecturers for future school use and from exchanging such tapes among each other. Without a prerecording right, the purported copyright exemption for even closed circuit educational broadcasting is self-destructive.

It is not in the public interest to legislate education back into the 18th century. Such modern educational techniques as the overhead projector, the language tape, educational broadcasting, and other similar modern technological developments are simply other forms of audio- and visual-education and should not be legislated into second-class status. Education is education and it does not change because it goes on camera, on tape, or on film any more than when it goes on the printed page. These media, including educational broadcasting, are integral and inseparable parts of the educational process. This fact was specifically recognized as to educational TV when, in reporting favorably on the bill which became P.L.87-447, providing for Federal grants for the utilization of TV in the nation's schools and colleges, the Senate Committee said that "Educational television promises the first fundamental advance in instruction methods since the invention of the printing press 500 years ago."

The AD HOC COMMITTEE ON COPYRIGHT LAW REVISION is composed, in the main, of non-educational broadcasters. That Committee has rejected any attempt to separate "educational broadcasting" from "education." Such an attempt would not only hamper and seriously cripple education by wrecking educational broadcasting, but would also fly in the face of a recently and deliberately enacted Congressional policy specifically devoted to the inseparability of ETV and education in the nation's schools.

"Fair Use" - No Substitute for Educational Exemption

As stated earlier, the present copyright law recognizes and protects education in two ways, first by a statutory exemption under the "for profit" clause which the proposed revision bill would destroy. The second method of recognition is in the "fair use" doctrine which is not in the statute but which the courts have read into the law. The proposed bill would codify "fair use" into the statute without purporting to change its substance. Therefore, "fair use" in the bill gives education nothing that it doesn't now have under judicial "fair use." The only change is that judicial 'fair use" is now linked with a statutory exemption for education, whereas the new bill would eliminate the statutory exemption and merely put "fair use" into the statute. Statutory "fair use" gives absolutely no certainty to a teacher, but only a possible and uncertain defense in a lawsuit against him. It gives no assurance of <u>when</u> copyrighted matter may be used, nor <u>how much</u> may safely be used. Even the Register of Copyrights and the American Book Publishers Council disagreed publicly as to how much of a work a teacher could use under "fair use" to illustrate a lesson. If such highly sophisticated copyright lawyers cannot agree, can you imagine the dilemma facing the classroom teacher?

The Register has officially advised inquirers that

> "The safest course to follow in using copyrighted material is to get permission first . . .

> When it is impractical to obtain permission, use of copyrighted material should be avoided unless it seems clear that the doctrine of 'fair use' would apply to the situation. If there is any doubt or question, it is advisable to consult an attorney." (Copyright Office, Circular 20, ¶5)

Since, according to the Register, "the line between 'fair use' and infringement is unclear and not easily defined' (ibid., ¶3), how can a teacher be expected to know when "it seems clear that the doctrine of 'fair use' would apply to the situation?"

There are those who advise education to give up its present automatic educational exemption under the copyright law (under the "for profit" clause) because they say, (1) "fair use" will take care of education's needs, and (2) there is no need for more since experience shows that there have been very few law suits anyway. Perhaps the major reason there have been so few suits is that the present law gives educators two legs to stand on, the automatic educational exemption and "fair use." By repealing the automatic educational exemption, the bill completely undercuts education's fundamental protection under present law against damage suits. Let me hasten to say that I am not opposed to "fair use'; however, it is of secondary value. Education's principal protection has been, and should continue to be, an automatic educational exemption in the nature of the present law's provision exempting nonprofit educational use from copyright infringement. "Fair use" is no substitute for such automatic educational exemption under the

present law, and it should not be under any revised law.

What education needs under the copyright law is a clear-cut automatic right to use materials for its noncommercial purpose. Instead of providing such right, the new bill is a lawyer's paradise by its inducement to law suits. Reliance on "fair use" would require teachers to have a "hot line" to their lawyers. "Fair use" is not determined ultimately by the teacher, but in a lawsuit where the teacher has the burden of proving "fair use." Under the "fair use" provision of the proposed bill, if a Court or jury find that what a teacher did failed to meet the highly technical tests for "fair use", the teacher is guilty of copyright infringement and is subject to personal liability for mandatory minimum damages of $250 for each infringement. Without an automatic educational exemption such as the copyright law now provides (in the "for profit" clause), in my judgment reliance on 'fair use" may be a snare and a delusion to teachers.

AD HOC COMMITTEE ON COPYRIGHT LAW REVISION

In order to defend education against the attempt to repeal the automatic educational exemption presently written into copyright law, an AD HOC COMMITTEE ON COPYRIGHT LAW REVISION was created in 1963. Widely representative, it is comprised of this nation's leading educational organizations. It held almost numberless conferences and consulted many lawyers including those representing

your Association. The Committee gave detailed study to the provisions of the present law and of proposed revisions. The Committee also gave long and serious consideration to (1) the desirable and necessary educational practices and patterns which have grown up under the present copyright law; and (2) the legitimate and necessary requirements of education for the future.

Intensive study has led the AD HOC COMMITTEE to the conclusion that the long-standing Congressional policy for an educational exemption under the copyright law not only has failed of full achievement, but also is now under heavy attack by those who would frustrate it further by radically undercutting that policy altogether. The Committee concluded that the vital interests of America's school children and youth require preservation and perfection of the concept of an automatic educational exemption which Congress has long-since written into the present copyright law. The Committee has therefore proposed that the Congress include in a revised copyright law a limited and reasonable statutory educational exemption which would:

1. continue the policy of the present copyright act of 1909 in providing for limited and restricted educational exemption for nonprofit, noncommercial educational organizations and institutions;
2. include educational broadcasting, both open and closed

circuit, in the limited and restricted educational exemption;

3. restrict nonprofit, noncommercial education to making only a single copy or recording of any full nondramatic copyrighted work; and also to a single copy or recording of any full dramatic copyrighted work where the performers are limited to students, faculty and staff of the educational institution and where the performance was not on a special admission fee basis; and

4. permit nonprofit, noncommercial educational organizations and institutions to make a reasonable number of copies or recordings of limited excerpts or quotations of copyrighted works but only for illustrative, critical or ancillary educational use.

And none of this would be permissible except where the copyrighted material so used is not sold or leased for profit, where no commercial advertising is included, and where no other private gain is involved. Thus, the AD HOC COMMITTEE'S proposal is within the spirit and pattern of the present copyright law's exemption for nonprofit educational use.

Copyright Law Must Serve Public Interest

One last observation may be in order, lest you be misled into believing that copyright is a fixed property right. A long line of Supreme Court and other cases have held that the scope of copyright protection is wholly a matter of Congressional discretion to grant or withhold. The House Committee's report on the present copyright law said that 'Congress has the power to annex to them [copyrights] such conditions as it deems wise and expedient." (House Report No. 2222, 60th Cong., 2d Sess., p.9). Chief Justice Hughes said for a unanimous Supreme Court that

> "The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors,' Fox Films Corp. v. Doyal, 286 U.S. 123, 127 (1932).

And Mr. Justice Douglas said for the Supreme Court:

> ". . . The copyright law . . . makes a reward to the owner of secondary consideration," U.S. v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948).

The Register of Copyrights has said:

> "Within limits the author's interests coincide with those of the public. Where they conflict the public interest must prevail . . .", Report to Congress, 1961, p.6.

The Register also said:

> "The needs of all groups must be taken into account. But these needs must also be weighted in the light of the paramount public interest," p. xi.

Education is the most universal expression of public interest in the United States. President Kennedy said in his Education Message to Congress:

> ". . . from every point of view, education is of paramount concern to the national interest as well as to each individual . . . Our teachers and instructors must be equipped with the best possible teaching materials and curriculum.", House Doc. No. 54, 88th Cong., 1st Sess., pp. 3.

Conclusion

I believe that the Congress faithfully protected "the paramount public interest" of this nation when it established, in the present copyright law, an automatic educational exemption for nonprofit educational use of copyrighted materials.

I respectfully suggest that it will be in "the paramount public interest" for the Congress to enact, in any revised copyright law, the proposals of the AD HOC COMMITTEE ON COPYRIGHT LAW REVISION which would preserve and perfect an educational exemption so as to enable teachers to make reasonable noncommercial use of copyrighted materials for the vital task of educating the school children and youth of America.

New Bill:

Excerpts - no mention

Complete work - educational radio or TV recording -- allows for an ephemeral reproduction to be made for a six months' period, then filed in an archival collection (This includes a recording for delayed broadcast.)

4. DURATION OF COPYRIGHT

Ad Hoc: 28 plus 28 or 28 plus 48

Present Law: 28 years plus 28 year renewal

July 20, 1964 draft: life of author plus 50 years

New Bill: life of author plus 50 years

5. DEPOSIT COPIES

Ad Hoc: exemption of this requirement for educational radio and TV recordings

Present Law: requires deposit of two copies of a copyrighted work. (Under informal arrangements, Register has kept only one copy of a motion picture.)

July 20, 1964 draft: same but allows Register to require only one copy in certain cases, presumably radio and TV recordings

New Bill: same as July 20 draft

6. INNOCENT INFRINGEMENT FINES

Ad Hoc: eliminate compulsory statutory damages for innocent infringers, leaving the amount of damages to a judge or jury to decide

Present Law: sets minimum statutory damage of $250 for each infringement (under most laws providing for damages, the judge has a discretion of either reducing the amount of damages or eliminating them entirely)

July 20, 1964 draft: preliminary draft called for waiver but when finally introduced the draft remained at $250 minimum damages

New Bill: compulsory damages would be reducible from $250 to $100

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New Bill: compulsory damages would be reducible from $250 to $100

THE IMPLICATIONS OF THE NEW COPYRIGHT BILL FOR THE CLASSROOM TEACHER[1]

The copyright law has not been revised since it was enacted in 1909. A new bill to replace the present law was introduced into both houses of the Congress on February 5, 1965 (H.R. 4347 and S. 1006).

The new bill has important implications for you, the classroom teacher.

It would PERMIT you:

.... To use any copyrighted material in the classroom in the course of face-to-face teaching activities, provided you don't copy it!

Examples: You could read aloud, recite, render, play, dance or act a copyrighted work.
You could play a tape recording or a phonograph record to your class.
You could tune in a television or a radio program in your classroom.
You could project material on an opaque projector.
You could show commercially produced transparencies on an overhead projector.
You could show a motion picture, filmstrip, or slides to a class.
You can act out a play in your class or in the auditorium.

It would PROHIBIT you:

.... From making copies of excerpts or quotations[2] from copyrighted works for teaching purposes, unless clearances are obtained and specified royalties are paid.

Examples: You could not photocopy, thermofax, mimeograph, hectograph, or otherwise duplicate copyrighted materials for the use of your pupils.

You could not make overhead transparencies of charts, diagrams, or other materials from a copyrighted work.

You could not include, as part of a dittoed examination, excerpts or quotations from contemporary poems or paragraphs for pupils' interpretation or for choral reading.

You could not reproduce maps, charts, or experiments from either current or old textbooks, even if you own the book.

You could not duplicate math problems selected from various books, pamphlets, and magazines for use by your pupils.

You could not duplicate tests from Teacher's Editions of weekly news magazines for use in class.

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[1] These comments are prepared in advance of the publication of the report of the Register of Copyrights stating his intention and purpose in drafting H.R. 4347 and S. 1006, and may need to be re-evaluated in the light of that forthcoming report.

[2] Under some circumstances which are not specified in the bill and which must be settled by individual court cases, copies or quotations may be allowed as "fair use."

It would PROHIBIT you:

.... From making a single copy of an entire copyrighted work for teaching, home study, or research purposes, or for use as a teacher's copy, unless you obtain necessary clearances and pay specified royalties.

Examples: You could not duplicate or make a transparency of a separately copyrighted chart, graph, or column from a newspaper or magazine.

You could not make a tape recording at home of a TV or radio program for use at school the next day.

You could not reproduce short poems from several books to supplement the class anthology or for oral interpretation.

You could not duplicate pictures from various sources in connection with a unit of work.

You could not make a tape recording of a band or choral group for self-evaluation purposes.

You could not make a copy of an article from an educational journal.

The bill also:

.... Permits undefined "fair use" of copyrighted materials, but subjects teachers to the possibility of a law suit in order to prove that the teaching use was a "fair use" under the law.

.... Mandates minimum statutory damages of $100 against teachers who innocently infringe copyright even where there is no actual damage to the author or publisher.

.... Substitutes a new copyright term of "life of the author plus 50 years" for the "28 years plus 28 years" which now is in effect. (This would prevent teachers from having access to 85% of the copyrighted works which now are not renewed after the first 28 year period and which automatically pass into the public domain.)

What does the classroom teacher NEED in a new copyright law?

The classroom teacher needs:

1. The right to use copyrighted materials for teaching and learning purposes, without the unnecessary delays arising from the need for copyright clearances and the payment of royalties.

2. The right to make a single copy of a copyrighted work or a reasonable number of copies of excerpts and quotations, for purposes of teaching, home study, and/or research where no direct or indirect commercial advantage or other private gain is involved.

(3)

ED 023 302 EM 006 785

By Siebert, Fred S

Use of Copyrighted Material for Instruction Through Inter Institutional Distribution by the Television

Minnesota Univ., Minneapolis Inter Institutional Television
Pub Date Oct 66
Note-17p
EDRS Price MF $0.25 HC $0.95
Descriptors-Broadcast Television, Closed Circuit Television, *Copyrights, *Educational Television, *Federal Laws, *Federal Legislation, Instructional Materials, Instructional Television, Interinstitutional Cooperation, *Program Content, Publications
Identifiers-Ad Hoc Committee on Copyright Revision, Copyright Act

Electronic media transmit instructional material that is protected by copyright law. Under the present Copyright Act (US Code, Title 17, 1909) teachers may use material in the "public domain," and excerpts from copyrighted works under the judicial doctrine of "fair use." Inter-institutional transmission of live performances of complete literary, musical, and graphic works (but not drama or film) may be made without proprietory clearance. Legal experts differ on the right to record for later television transmission those programs which contain complete, copyrighted works. The "not-for-profit" exemption under which education has used copyrighted materials is eliminated in the proposed 1965 revisions before Congress (HR 4347 and S 1006). These Bills provide for extended use of copyrighted works in the classroom in all categories except drama, but award no exemption to the recording of complete works in an educational program. An "ad hoc Committee on Copyright Revision," representing a number of educational organizations, recommended amendments to Congress that recognize educational uses and permit the telecast of instructional problems to receivers other than those in a classroom. Ordinary copyright principles apply to duplication and distribution of supplementary instructional materials from copyrighted sources. (TI)

Use of Copyrighted Materials for Instruction Through Inter-Institutional Distribution by Television

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Prepared for the Feasibility Study of Inter-Institutional Television • University of Minnesota, Minneapolis, Minnesota

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
OFFICE OF EDUCATION

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Use of Copyrighted Material for Instruction through Inter-Institutional Distribution by Television

Prepared for Feasibility Study of
Inter-Institutional Television
University of Minnesota
Minneapolis, Minnesota

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East Lansing, Michigan
October, 1966

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ED 023 302

Use of Copyrighted Material for Instruction through
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Use of Copyrighted Material for Instruction through Inter-Institutional Distribution by Television

Introduction

This memorandum attempts to answer a number of questions concerning the legal use of instructional materials in educational programs which are prepared for inter-institutional use either by closed circuit or broadcast transmission. Such use may include "live" transmission, recording or taping of programs for later transmission, and exchange of programs between institutions.

Education is concerned primarily with the development and transmission of ideas and information. These objectives can be performed in the intimate relationship between teacher and student, in the classroom with a group of students, or by more modern methods such as the use of the electronic media which can transmit instructional programs to students assembled in a classroom or lecture hall or to the public at large.

Our society, and especially our educational structure, is based on the concept that both ideas and information are free and available for general use without restrictions either legal or otherwise. Under our legal system there can be no monopoly or proprietorship in ideas and information. An exception may take place where an idea can be embodied in a specific format and then patented under federal law. But ideas and information are not protected by copyright law.

What is protected by copyright is the format into which ideas and information may be cast. The owner of the format has therefore an ownership which he can protect through the law.

Not all formats or presentation of ideas and information are protected from use by others by law. Much of the instructional materials which might be used are in the "public domain" and available for any use whatsoever. Materials which have been published and which have never been copyrighted and carry no notice of copyright may be used in any way by anyone, including teachers who prepare classroom lectures or produce taped or recorded programs for television broadcast.

Materials which are protected from use without the owner's consent include (a) unpublished materials, and (b) published materials which have been copyrighted under the federal copyright act.

Unpublished materials are those which have never been duplicated or otherwise made available for public consumption. A teacher who has access to a private letter may appropriate the information and ideas in the letter but may not duplicate and distribute the letter without the owner's consent. No special formalities of copyright are necessary to protect the owner's rights.

However, when materials are "published," i.e., duplicated and offered to the general public, the owner must proceed to have the work "copyrighted" under the federal act. The principal formality is to mark the work "copyrighted" so as to give notice to the public that it may not be used without the owner's consent. After publication, a copyrighted work is protected for a period of 28 years, after which the copyright may be renewed for another 28 years. After 56 years, all works are in the public domain.

In summary, teachers may use any materials in the public domain. They may extract ideas and information from both published and unpublished works.

but they may not make "copies" of either unpublished works or of copyrighted published works.

The Copyright Act, however, does permit some limited uses of copyrighted materials. This use may vary according to the purpose of the use, the nature of the materials which are used, and the amount of "copying."

Part I of this memorandum will discuss these uses of copyrighted materials as they apply specifically to electronic transmission and broadcast of instructional programs for inter-institutional use under the present copyright law.

Unfortunately we are at present in a transitional period as regards the specific provisions of the copyright law. The present Act was passed by Congress in 1909. Several attempts have been made in the past to enact complete revisions of this Act, but all failed. However, in the past five years the Copyright Office has been conducting studies of the problems of copyright looking toward a complete revision. In 1965, identical Bills (H.R. 4347 and S. 1006) were introduced in both houses of Congress and hearings have been conducted on these Bills. Part II of this memorandum discusses the problems of educational uses of copyrighted materials as they are affected by the revisions in these Bills.

Educational organizations have been active in attempting to expand educational uses of copyrighted materials and formed an "ad hoc committee on copyright revision" to advance these interests. This committee has proposed a number of amendments to the proposed Bills and their effects on the subject of this memorandum are discussed in Part III.

Part IV discusses the use of copyrighted materials in supplementary printed or duplicated teaching aids which might be used in connection with broadcast educational programs.

This paper does not discuss the problem of the legal ownership of the instructional program produced by the educational institution. It is assumed that this subject will be discussed in Paper 3, Faculty Rights, Responsibilities, and Concerns as they relate to the Intra- and Inter-Institutional Use of Television Materials.

I. Educational Uses under the Present Copyright Law

A. Use of Excerpts from Copyrighted Works

The present Copyright Act (U.S. Code, Title 17) does not provide for any special uses of copyrighted material for educational purposes. However, many educational uses, including broadcasting, are permitted under various classifications provided for in the Act.

First, a distinction must be made between use of excerpts from copyrighted works and the use of complete works. It is impossible to define precisely what is an "excerpt." It is certainly less than the whole work, so that a map or chart or picture which can be copyrighted individually is not an excerpt even though it may come from a composite work. A complete chapter from a twenty-chapter book would not be an excerpt. The chorus from a song would also not be an excerpt.

On the other hand several stanzas from a ten-stanza poem would be an excerpt. Two or three pages from a chapter in a text book would also be an excerpt. A short scene from a three-act play would be an excerpt. A useful

rule of thumb would be that if the part of the copyrighted material which is used for educational purposes is small enough not to lessen the return which the copyright proprietor might expect from the sale of the complete work, the part is an excerpt.

Education can make any use whatsoever if the used item is an "excerpt." Such uses would include making any number of duplicated copies, use of the excerpt in either a live or taped television performance, or any type of recording.

In short, a teacher may make any use whatsoever of an excerpt from a copyrighted work so long as the material used is only an excerpt. Such use is made legal by the doctrine of "fair use" as interpreted by the courts.

B. Uses of Complete Copyrighted Works

Educational uses of complete copyrighted works is a much more complex subject. Some types of complete works may be used under specified circumstances. A complete work would include a novel, a poem, a piece of music, a picture, a map or a graph, or an article from an encyclopedia.

It is a common practice for publishers to re-issue a work in which the copyright has expired with a current copyright notice. This current copyright, however, does not protect the original work but only the new material added in the form of preface, notes, or others.

In order to determine when complete copyrighted works may be used for educational purposes, it is necessary to make a number of distinctions and classifications. First a distinction must be made between a "live" presentation and a "recorded" or taped performance. "Live" performances for television transmission may be made of a number of different types of

copyrighted works; a recorded performance for later reuse may be made of a more limited category of protected materials.

It should be noted that the present Copyright Act makes no distinction between materials which are broadcast and those which are used solely on closed circuit. However, the proposed Bill in Congress provides for such a distinction which is discussed in Part II of this memorandum.

1. Live presentations of complete works

Educational television (either broadcast or closed circuit) may utilize some specific categories of complete works without clearance or permission from the copyright proprietor. For the purposes of this section, copyrighted materials must be sub-divided into the following categories:

a) copyrighted literary materials
b) copyrighted music
c) copyrighted dramas and musical dramas
d) copyrighted photographs, maps, and charts
e) copyrighted films and film strips
f) phonorecords (sound recordings)

Under the present law, live television or radio performances may be made of complete (a) literary and (b) musical works. This use is provided for in Sec. 1 (c) and (e) of the Act which permits performance of both literary and musical works when such performance is "not-for-profit." It is assumed that most if not all educational uses of literary and musical works is "not-for-profit."

Under this exemption in the present law, a university professor may read a complete novel on radio and television. A university orchestra may perform any musical work in the same manner.

However, this same permitted performance does not extend to (c) dramas or musical dramas. Here the educational institution must obtain permission

from the copyright owner in order to perform the work either on broadcast or closed circuit television. The not-for-profit exemption does not apply to plays, operas, operettas, or other types of musical dramas.

The problem of the use of copyrighted (d) graphics, which includes photographs, maps and charts, is more complex. The present Copyright Act does not provide for not-for-profit uses of graphic materials. However, neither does the Act prohibit the "live performance" of such materials. Pictures, graphs, maps and charts may be used as live presentations in a course lecture without special clearance. (Note: The situation is much different where the lecture is recorded, as will be discussed below.)

The problem of the use of copyrighted (e) film strips and films (either with or without sound) is even more complex.

A copyrighted film or film strip (with or without sound track) may not be used on educational television without the permission of the copyright owner. Most films are made in a limited number of copies where the rights of performance are retained by the owner and the copies rented or leased for specific types of uses. It is possible for an educational institution to rent or lease these films for inter-institutional transmission and use.

The present copyright law does not grant any exclusive rights to the producer or performer of a (f) phonorecord (sound recording). The original copyright holder of the material appearing on the record retains all rights of duplication and performance.

In summary, inter-institutional transmission of live performances of complete literary, musical, and graphic works may be made without clearance from the copyright proprietors. Live use of complete dramas, musical dramas, and films may not be made without permission from the copyright owners.

2. Recorded presentations of complete works for later reuse

Much of the economy of intra- and inter-institutional use of televised instruction derives from the fact that such programs can be recorded and reused for later groups of students. The right to make recordings of those educational programs which include only excerpts from copyrighted works as defined above is unquestioned. This is part of the doctrine of "fair use."

However, the right of an educational institution to record complete works is far from clear under the present Copyright Act. (Note: The right to record such programs under the proposed new Copyright Act is discussed in Part II.)

Legal experts differ on the right to record. It is my considered opinion that under the present Act an educational institution may record for later television transmission either broadcast or closed circuit those educational programs which contain complete literary or musical works. It may not record complete dramas, musical dramas, graphics, films or film strips without the permission of the copyright proprietor. Some lawyers, particularly those whose clients are copyright owners, disagree with this position. The statute is not clear and there are no court cases. My best judgment is that stated above.

II. Educational Uses of Copyrighted Materials under the Proposed Copyright Bill before Congress

The Copyright Office and sub-committees of both Houses of Congress have been studying the problems of copyright looking toward a complete revision of the present law. Identical bills have been submitted in both

houses (H.R. 4347 and S. 1006). They provide for significant revisions of the present Act, especially as they affect educational uses of copyrighted materials.

The proposed revisions generally enlarge the rights of the copyright proprietor and to that extent curtail educational uses. The "not-for-profit" exemption under which education has utilized copyrighted materials is eliminated in the present draft. The term of protection is extended from a maximum of 56 years to the life of the author plus 50 years, thus postponing the time when a work enters the public domain.

The best information at this time (October 1966) is that enactment of the new copyright law will not take place until late 1967 or early 1968.

The proposed legislation, if enacted as drafted, will have significant effects on intra- and inter-institutional transmission of educational programs.

A. Use of excerpts under proposed revision

No change is proposed in the educational and other uses of excerpts from copyrighted works. However, the judicial doctrine of "fair use" is to be given Congressional sanction by the inclusion of a section specifically recognizing this doctrine.

B. Use of complete works

The 1965 Bills provide for the extended use of copyrighted materials in a classroom, or as the draft Bill states use "of a work by instructors or pupils in the course of face-to-face teaching in a classroom" (Sec. 109(1)). All types of copyrighted materials may be used "live" in the classroom.

However, several restrictions are placed on the use of copyrighted materials which are broadcast and/or recorded.

In any type of live transmission use may be made of complete copyrighted works except dramas and musical dramas in the course of instruction. The transmission must be made "primarily for reception in classrooms or similar places normally devoted to instruction and is a regular part of the systematic instructional activities of a nonprofit educational institution." (Sec. 109 (2)).

It would appear that educational programs prepared for either inter- or intra-institutional use and transmitted either by broadcast or closed circuit and directed primarily to classrooms under the proposed Bill may utilize complete copyrighted works of all categories except dramatic works.

C. Phonorecords (sound recordings)

Under the existing copyright law, phonorecords or sound recordings of music, literary works or other sounds are not copyrightable. The original copyright owner of the literary or musical work controls the right to record.

However, under the proposed copyright revision, the maker or manufacturer of a sound recording may copyright his presentation and prohibit others from reproducing it.

Under the terms of the Bill, a phonorecord can be played in a classroom and also on an educational broadcast which is primarily instructional. One recording of the phonorecord can be made for delayed broadcast.

D. Recording

It is in the area of recording programs containing copyrighted materials that the proposed Bills are most restrictive. It is argued that the doctrine of "fair use" would permit the recording of excerpts of copyrighted

works in that same way that they are now permitted under the present copyright law.

The recording of complete works in an educational program, including literary works, music, and graphics, is given no special preference in the new Bills.

Section 110 of the draft Bills gives both educational and commercial interests the same right to record. The section reads as follows:

"...it is not an infringement of copyright for an organization lawfully entitled to transmit a performance or exhibition of a copyrighted work to the public to make no more than one copy or phonorecord of the work solely for the purposes of the organization's own lawful transmission or for archival preservation, if the copy or phonorecord is not used for transmission after six months from the date it was first made, and is thereafter destroyed or preserved for archival purposes only."

This section would mean that an educational institution which prepared an instructional program could make only one tape recording and this recording could not be used in either broadcast or closed circuit after six months. It would mean that recordings of the program containing copyrighted materials could not be exchanged with other educational institutions without getting clearance from the copyright owners.

III. Educational Uses of Copyrighted Materials Under Proposed Amendments to the Copyright Bill

Shortly after the announcement that a revision of the Copyright Act would be submitted to Congress, a number of educational organizations and associations formed an "ad hoc Committee on Copyright Revision." Among the

organizations represented on this committee are the American Council on Education, the National Education Association, the Modern Language Association, the National Council of Teachers of English, and the National Association of Educational Broadcasting.

This committee has recommended a number of amendments to the proposed Copyright Bill and has testified in support of these changes before the subcommittees of the House and the Senate. In addition a number of conferences have been held with the staff of the Copyright Office in an attempt to find some compromise solutions to the problems which the Bill poses for education.

The following are the proposed amendments to H.R. 4347:

A. Fair Use. The ad hoc committee recommends that the legislative statement of "fair use" in the Bill specifically include mention of educational uses. The following is suggested:

> Sec. 107 Notwithstanding the provisions of Section 106, the fair use of a copyrighted work including its reproduction in copies and phonorecords, or otherwise, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include, among others:
> (a) the purpose and character of the use;
> (b) the nature of the copyrighted work;
> (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
> (d) the effect of the use upon the potential market for or value of the copyrighted work.

B. Transmission to classrooms. The ad hoc committee has recommended that the draft Bill be amended to permit the televising of instructional problems to receivers other than those in a classroom. The Copyright Office has apparently agreed to such an amendment.

C. Recordings. The ad hoc committee has recommended that the producer of a recording of an educational program be allowed to make two (instead of one) copies and that these copies be available for use for a period of five years. Educational broadcasters are asking for five to ten copies of each program.

Whether these suggested changes in the proposed Bill will be enacted into law will not be known until Congress has acted on the entire problem of copyright revision.

IV. Duplication and Distribution of Supplementary Instructional Materials from Copyrighted Sources

It is common practice to supply students in regular televised courses of instruction (either broadcast or closed circuit) with printed or duplicated instructional materials for outside study or reading. Much of this material is ordinarily prepared by the instructor to meet the specific needs of the course.

The ordinary copyright principles apply to the production and distribution of this supplementary material. The instructor may use <u>excerpts</u> from literary works without any further clearance from the copyright owners. He may not include copies of <u>complete</u> works without the proprietor's consent. Complete works would include such short works as an entire poem, a short story, an article from a copyrighted magazine or newspaper, a map, chart or picture.

The same restrictions apply to the production of supplementary material as would apply to the production of a regular textbook.

V. Summary

Summary of instructional uses of both copyrighted excerpts and complete works on inter- or intra-institutional television under existing copyright law

	Live broadcast or Closed circuit	Recorded
Copyrighted literary matter	Yes	Yes
Copyrighted music	Yes	Yes
Copyrighted drama	No	No
Copyrighted graphics	Yes	No
Copyrighted films	No	No

Instructional uses under proposed legislation

Copyrighted literary matter	Yes	1 copy for 6 months
Copyrighted music	Yes	Ditto
Copyrighted drama	No	No
Copyrighted graphics	Yes	1 copy for 6 months
Copyrighted films	No	No
Copyrighted phonorecords except of dramas	Yes	1 copy for 6 months

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IMPORTANT

FACT SHEET ON COPYRIGHT LAW REVISION

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Bill Numbers: S. 597; and H.R. 2512 with accompanying House Report No. 83, 90th Congress, 1st Session, issued March 8, 1967

Major Areas of the Bill which Affect Education's Uses of Copyrighted Materials:

1. Fair use (for classroom, library, educational broadcasting, audiovisual and computer uses)
2. Statutory authorization for limited copying
3. Waiver of statutory damages for innocent educational infringers (classroom teachers, TV teachers, librarians)
4. ETV and ITV (broadcast, closed-circuit, 2500 mHz-ITFS)
5. New educational technology (computers, dial access, information storage)
6. Duration of copyright

Areas in S. 597 and H. R. 2512 which Represent Improvements for Education as Compared to the 1965 Bill:

1. The statutory "fair use" provision of the bill and the House Report as they apply to classroom teaching (Section 107 and House Report)
2. The discretionary waiver of statutory damages for classroom teachers who innocently infringe /Section 504(c)(2)/

Areas which Are Definitely Damaging to Education:

1. The severe limitations put on the use of copyrighted materials on the newer educational technology in the classroom, especially the virtual ban on individualized uses and on independent learning activities /Section 110(2)(D) and House Report, p. 46/
2. Severe limitations on the use of copyrighted materials on instructional broadcasting, especially in limiting programs to a 100 mile radius, for one year, with no more than two copies /Section 110(2)(A),(B),(C); Section 112(b)/
3. Undue restrictions on fair use of copyrighted materials for instructional radio and television broadcasts (House Report, p. 36)
4. No distinctions are made between instructional uses of materials on open broadcast channels and on closed-circuit or 2500 mHz channels. The bill equates closed circuit and open circuit uses. (The Ad Hoc Committee on Copyright Law Revision feels that CCTV and ITFS are simply extensions of the classroom and that teachers on these facilities should have the same statutory treatment as classroom teachers.) (House Report, p. 41)
5. Specific rejection in the bill of major forms of instructional uses of computers /Section 110(2)(D) and House Report, p. 46/

(over)

6. The interpretation and wording of the House Report on Criteria #4 under "Fair Use" regarding the "Effect of use on potential market for or value of the work." (The statement to which the Ad Hoc Committee objects reads: "Where the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection." (House Report, p. 35)

7. No waiver of statutory damages authorized for ITV and radio teachers or librarians /Section 504(c)(2) and House Report, p. 130/

8. The provision for duration of copyright for a period of life of the author plus 50 years, in lieu of the present 28 years plus 28-year renewal period (Section 302 et seq.)

March, 1967

Harold E. Wigren, Chairman
Ad Hoc Committee (of Educational Organizations and Institutions) on Copyright Law Revision

(5)

Educational Television—A Non-Commercial Viewpoint

Eugene N. Aleinikoff

The following analysis focuses on the problem of copyright law for the educational broadcaster. This should be an important concern for him since new copyright legislation may be passed by Congress this year.

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Educational television (ETV) and copyright law revision have been closely contemporaneous happenings on the American scene. The birth of educational television, fathered by the Ford Foundation and mothered by then FCC Commissioner Frieda Hennock, was heralded in 1952 by the official reservation of a portion of the television spectrum exclusively for non-commercial educational use.[1] Copyright revision can trace its formal genesis, after many false starts during the first half-century, to a 1955 congressional appropriation to the U.S. Copyright Office to initiate research towards that goal.[2]

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[1] Sixth Report and *Order* of the Federal Communications Commission, 17 Fed. Reg. 3905 (1952). A full description of early ETV history is set forth in J. Powell, Channels of Learning: the Story of Educational Television (1962).

[2] Legislative Appropriation Act for Fiscal Year 1956, 69 Stat. 429, 517 (1955). With these funds, the Copyright Office supervised preparation of over thirty general studies, a number of which were subsequently published in a series of Senate Judiciary Committee prints as background material for copyright revision. Studies Prepared for the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 1st and 2d Sess. (1960).

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Nevertheless, for some time neither educational broadcasters nor copyright proprietors were particularly concerned about the other's plans or activities. ETV proponents were much too pressed by immediate problems of finding acceptance for ETV in the educational community, establishing ETV stations nationwide, meeting urgent funding needs, and creating quality program sources, to worry overly about peripheral copyright considerations.[3] On their part, copyright interests tended to view educational television, like its predecessor educational radio, as primarily campus-oriented with limited audiences interested in esoteric erudition. As a result, most publishers and their agents were willing to contribute use of their material without charge or to overlook its unauthorized appearance on ETV programs.[4] Nor did the Copyright Office see any reason why the historic "for profit" exemption should not continue to be applicable to non-dramatic music and literary works without distinction between educational broadcasting and more venerable educational institutions.[5]

But as educational television grew, matured, and reached national consciousness with a sudden rush after slow beginnings, the attitude of the copyright proprietors stiffened. The enactment of the Educational Television Facilities Act[6] under which large federal grants for the first time became available to ETV stations, and the ETV purchase of a prominent television channel in New York City[7]—both in 1962—aroused the publishing industries to the possibility of new and considerable financial returns from ETV. Extrapolating from the Second Circuit's holding in 1944 in *Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc.*, that a commercial radio station operated by a tax-exempt foundation was not entitled to wrap a not-for-profit copyright cloak over its non-sponsored programs,[8] the professional copyright bar sharply increased its questioning of educational television's preferred position under the law.

Realizing, however, that the *Debs* decision might not be so readily extended to non-commercial ETV stations operated by non-profit educational organizations and forbidden from broadcasting any form of paid advertising,[9] the copyright establishment soon saw the need to attack the "for profit" restriction head-on as unjustified and inappropriate for edu-

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[3] The depth and breadth of the many philosophical and practical problems that have confronted ETV from the start, and still continue, are reflected in A TELEVISION POLICY FOR EDUCATION (C. Newsom ed. 1952); THE FARTHER VISION—EDUCATIONAL TELEVISION TODAY (A. Koenig ed. 1967).

[4] Both the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), the principal American music licensing organizations, for many years voluntarily granted free or token broadcasting licenses to all interested ETV stations. *See* Comment, *The Legal Problems of Educational Television*, 67 YALE L.J. 639, 663-72 (1958).

[5] REGISTER OF COPYRIGHTS, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 27, 28 (House Judiciary Comm. Print 1961).

The "for profit" performance qualification on the rights of copyright owners has been applicable to musical compositions under section 1(e) of the Copyright Law, 17 U.S.C. (1964), ever since the last major revision in 1909, 35 Stat. 1075, and to non-dramatic literary works under section 1(c) since the last substantial amendment in 1952, 66 Stat. 752.

[6] 47 U.S.C. § 391 (1964).

[7] Channel 13, Newark, N.J., servicing the greater New York City metropolitan area, began operation as ETV station WNDT in September, 1962.

[8] Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc., 141 F.2d 852 (2d Cir.), *cert. denied*, 323 U.S. 766 (1944).

[9] Rules and Regulations of the Federal Communications Commission, 47 C.F.R. § 73.621 (1967); *cf.* M. NIMMER, COPYRIGHT § 107.3 (1967).

unacceptable to the Ad Hoc Committee. Section 1(b)(2) of S.2216, as explained by the Senate Report, completely reopens the whole issue of photoduplication, which the compromise agreement was supposed to settle and close under §107.

Section 1(b)(2) reads as follows:

> "(b) The purpose of the Commission is to study and compile data on the reproduction and use of copyrighted works of authorship . . . (2) by various forms of machine reproduction."

The Report of the Senate Committee states in general terms:

> "It is not the intention of the committee that the Commission should undertake to reopen the examination of those copyright issues which have received detailed consideration during the current revision effort, and concerning which satisfactory solutions appear to have been achieved."[1/] [emphasis added]

However, when the Senate Committee's report gets to the specifics of photoduplication, quite another situation seems to prevail:

> "Another important copyright issue arising from technological developments is the reproduction of copyrighted material by use of various machines. Photocopying in all its forms presents significant questions of public policy, extending well beyond that of copyright law. No satisfactory solutions have emerged in the limited consideration devoted to this problem during the current revision effort. Therefore, the establishment of some type of study commission appeared to be both necessary and desirable." (p.2) [emphasis added]

The Senate Committee's Report incorporates a report from the Librarian of Congress on his and the Register's behalf. This latter report comments:

(2) "Fair use" is a permanent provision in the copyright law, in no way to be diminished by any proposed clearing house or licensing system. [For comments on a copyright clearing house, see Exhibit 3.]

"Fair use," and the limited educational copying and recording it specifically authorizes by statute, is not an occasional or merely casual right; it is a constant and continuing right. Under the compromise, "fair use" is a fundamental and permanent statutory charter for education. "Fair use" is not given by leave of the copyright owner, but is specifically and statutorily reserved for education by Congress out of the copyright monopoly. It is not a privilege awarded by the publisher, but a right specified by law.

One witness before Congress was candid enough to state that he regarded fair use "as a temporary safety valve until some clearing house system is established. At that time, the concept of fair use should lose its importance and die off as some form of vestigial tail."6/ If this is true, Ad Hoc wants nothing of such phoney "fair use," and is free of any commitment to the compromise agreement.

B. Inclusion of words: "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research."

C. Inclusion of words: "including such use by reproduction in copies or phonorecords or by any other means specified by that section [§106]."

Such language would be the first statutory recognition that "fair use" includes copying and recording, and was designed and accepted to settle clearly and unmistakably the legal right of education to photo-duplicate and record within the limits of "fair use."

There is imminent danger of a complete breakdown in connection with this indispensable element of compromise. The Senate adopted S.2216, 90th Congress, 1st Session, to set up a National Commission on New Technological Uses of Copyrighted Works. One provision in this bill is in effect a major textual change of §107 which is an unacceptable change in meaning and purpose of §107, and therefore renders both S.2216 and §107

"recognizing the need for greater certainty and protection for teachers" (p.31). Thus the House Committee's Report specifically states:

> "The committee sympathizes with the argument that a teacher should not be prevented by uncertainty from doing things that he is legally entitled to do and that improve the quality of his teaching. It is therefore important that some ground rules be provided for the application of fair use in particular situations." (p.32).

Therefore, the Report is designed to

> "provide educators with the basis for establishing workable practices and policies." (p.33)

Consequently, in the light of the entire legislative history the Ad Hoc Committee believes the total compromise on "fair use" (developed at the "summit conference" and adopted in the House bill and Committee Report) gives to "fair use" a statutory and Congressional infusion of positive doctrine where prior judicial gaps prevailed. As Ad Hoc sees it, the effect of the House bill and report, taken together, is to write into statute the basic position (although not necessarily all the specifics) espoused by the Ad Hoc Committee in connection with its proposed statutory authorization for limited educational copying and recording.

The Ad Hoc Committee's acceptance of the compromise was based upon the recognition and joint presence of five essential and indispensable elements, in proper and agreed-upon balance, as follows:

A. <u>Statutory recognition of "fair use" as a permanent right under copyright law</u>.

This essential element involves two aspects:

(1) adoption of the full text of §107 as voted by the House, without any textual changes whatsoever.

Efforts on the part of some members of the copyright proprietors' community to seek so-called "clarifying" or other changes are unacceptable to Ad Hoc.

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work."

The compromise thus effectuated carried with it the agreement by the Ad Hoc Committee to forego its insistence upon its proposed §111.

This compromise must be understood in the light of the voluminous testimony and the heated controversy on the uncertainties of "fair use" for educational purposes under present law. The Ad Hoc Committee consistently regarded "fair use" as insufficient to be the principal means for meeting education's needs because of "fair use's" uncertainty and unreliability. Dr. Wigren testified thus:

> ". . . statutory fair use is not enough for education to do its job. Fair use is not a sufficient guideline to the classroom teacher to know when copyrighted materials may or may not be used. Under the present law we have fair use judicially interpreted plus the 'for profit' limitation. Under H.R.4347 we have statutory fair use merely mentioned and no 'for profit' limitation. Substituted for the 'for profit' limitation is a most inadequate and limited §109 which gives categorical exemptions rather than a uniform general one."4/

At various Congressional hearings, Ad Hoc's Counsel, Harry M. Rosenfield, went into considerable detail as to the uncertainties of "fair use" for teachers. (For a general analysis of this point see Exhibit 2.)

The House Committee itself officially recognized this situation:

> "Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged."5/

Therefore, the House Committee adopted the compromise as a means of

II. Statutory "Fair Use"

At the suggestion of Dr. Harold E. Wigren, Chairman of the Ad Hoc Committee, a series of so-called "summit conferences" were called by the Register of Copyrights. The top representatives of education, the publishers and organized authors were called together in June, 1966, under Chairmanship of Mr. Herbert Fuchs, Counsel to the House Judiciary Subcommittee that had been holding legislative hearings. The purpose was to explore areas of agreement and disagreement among the various interests involved, and especially areas of possible accommodation.

There were six such meetings, one devoted to classroom uses, one to "fair use," two to educational broadcasting and two to computers. Attendance was on a limited invitation basis. At these meetings, the Ad Hoc Committee was represented by a total of 18 persons, variously selected to attend a particular meeting on the basis of the agenda topic and with reference to insuring representation from all major facets of Ad Hoc's concern.

The meetings were highly significant and often witnessed a genuine effort to grapple with problems in a spirit of mutual accommodation. Perhaps the single most direct result of these "summit conferences" was an agreement upon a statutory "fair use" provision with major substantive changes in language and associated Congressional Committee reports. This agreement resulted in (a) §107 being adopted by the House in H.R.4347, 89th Congress, 2nd Session and in H.R.2512, 90th Congress, 1st Session; and (b) the accompanying House Report No. 2237, 89th Congress, 2nd Session and House Report No. 83, 90th Congress, st Session.

Section 107 reads as follows:

"§107. Limitations on exclusive rights: Fair Use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

(1) the purpose and character of the use;
(2) the nature of the copyrighted work;

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map; a performance by a school chorus or band for the purpose of self-evaluation; a television or radio program from a series; or an article from a magazine.

The Ad Hoc Committee does not intend Section 111(a) to extend to such practices as making a copy of an entire book, novel, dictionary, reference book, encyclopaedia, magazine, newspaper pamphlet, monograph, workbook, standardized test, motion picture, filmstrip, or any other use intended to supplant the purchase of instructional material easily available through commercial channels.

Section 111(b) would permit, for noncommercial educational purposes, the making of multiple copies of excerpts or quotations from copyrighted works such as excerpts from contemporary writings in a duplicated examination or classroom exercise, the reproduction of a map or a chart from a newspaper or from a text for classroom use, or the making of a diagram from a magazine for overhead projection. It would not permit copying of excerpts from materials originally consumable upon use, such as workbook exercises, problems, or answer sheets for standardized tests."

The Ad Hoc Committee's double-pronged approach (e.g., retention and expansion of the "not-for-profit" principle, coupled with statutory "fair use") is the simplest, fairest, and most certain way to serve education's needs under the copyright law.

However, the Ad Hoc Committee agreed to a compromise position, in order to achieve the same general result in a different way through

A. a revised and somewhat more specific statutory "fair use" section, and

B. a legislative history (by means of a Congressional Committee report) sanctioning approved educational practices under the copyright law. [The House Report, described below, especially mentions many examples cited by testimony and documents of the Ad Hoc Committee and its constituent groups.]

(The Committee is NOT asking for the right to make a single copy of an entire book or novel; dictionary, reference book, encyclopedia, magazine or newspaper, pamphlet or monograph; workbook or standardized test; motion picture or filmstrip.)

--Multiple copies of excerpts or quotations from copyrighted works such as excerpts from contemporary writings in a duplicated examination, the reproduction of a map or a chart from a newspaper or from a text for classroom use, the making of a diagram from a magazine for overhead projection, or the recording of a school orchestra for the purpose of self-evaluation.

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On April 18, 1966 the Ad Hoc Committee issued a one-page explanation of §111's objectives, as follows:

"EXPLANATORY LANGUAGE ON AD HOC COMMITTEE'S SECTION 111

Under the present law, there is controversy whether and to what extent copies and recordings of copyrighted materials, in whole or in part, may be made for instructional purposes. Over the years, a general and largely unchallenged practice has grown up of making copies and recordings of copyrighted works or excerpts of such works for classroom use, educational television, and related teaching purposes. This practice has been defended as authorized under two aspects of the Copyright Act of 1909, as amended: (1) the not-for-profit provision and (2) "fair use."

The Ad Hoc Committee believes that teachers should be enabled to make creative use of copyrighted material in the classroom. It recognizes at the same time the possibility of abuse by individuals of the privilege of using copyrighted materials. The language of Section 111(a) will permit teachers and educational organizations to make a single copy of an entire non-dramatic work for purely noncommercial teaching purposes. For example, a teacher could copy or record a poem; a transparency or a chart, graph, diagram from a book, newspaper or a magazine; a short story; an essay; a

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fully entitled under §109 to perform, exhibit, or to transmit a performance or exhibition of, a copyrighted work (save those originally consumable upon use, such as workbook exercises, problems, or answer sheets for standardized tests)

(a) to make no more than one copy or phonorecord of the work in the course of such use, provided that no copy or phonorecord may be made of dramatic works (including any accompanying music), pantomimes and choreographic works, and motion pictures or filmstrips unless the performers and the audience are limited to students, faculty, or staff, and

(b) to make a reasonable number of copies or phonorecords of excerpts or quotations from the work, provided that such excerpts or quotations are not substantial in length in proportion to their source

solely for purposes of such person's or organization's own teaching, lawful performances, exhibitions and transmissions, for course work study in connection therewith, for research or for archival purposes, provided that no such copyrighted material is sold or leased for profit and that no direct or indirect private gain is involved."

The Ad Hoc Committee's objective in connection with this proposed §111 was stated as follows:

"In order to protect the teaching process and enable teachers to teach creatively, the Ad Hoc Committee recommends that the law be written specifically to authorize teachers to make copies or recordings for purely noncommercial teaching pruposes as follows:
--a single copy of an entire work such as
a poem
a transparency of a chart, graph, diagram from a book, newspaper or a magazine
a short story
an essay
a map
a TV or radio program
an article from a magazine

"not-for-profit" concept:

> "We believe that the principle of the 'for profit' limitation . . ., and the application given to that principle by the courts, strikes a sound balance between the interests of copyright owners and those of the public . . .. We believe, however, that any attempt to specify the various situations in which the principle applies would be likely to include too much or too little, and to raise new uncertainties."2/

From the outset, the Ad Hoc Committee agreed with and insisted upon the "not-for-profit" concept so expressed by the Register in 1961. The Ad Hoc Committee's original proposal was a two-pronged approach for copyright revision:

I. Retention and Expansion of "Not-For-Profit" Principle, and

II. Statutory "Fair Use."

I. "Not-For-Profit" Principle

The 60-year-old "not-for-profit" principle was, in effect, an automatic but limited statutory exemption giving restricted rights to nonprofit education to use copyrighted material without clearances or royalties.

In accepting the principle enunciated by the Register in 1961, the Ad Hoc Committee proposed to effectuate it by (a) retention of the "not-for-profit" concept for nonprofit educational use, and (b) application of the concept to both (i) performance and (ii) restricted copying and recording for nonprofit educational purposes.

This objective, which has continuously been regarded as the most urgent of Ad Hoc's proposals, was formulated by the Ad Hoc Committee into legislative language as an amendment to H.R.4347-S.1006. On March 1, 1965, the Ad Hoc Committee proposed the following new proposed §111:

> "§111. Limitations on exclusive rights: Educational copies and recordings
>
> Notwithstanding the provisions of §106, it is not an infringement of copyright for anyone law-

resources for teaching and learning in nonprofit educational institutions, now and in the future; and

(5) assures teachers a reasonable degree of certainty as to what copyrighted materials may be used for nonprofit educational purposes.

Less than this kind of bill the Ad Hoc Committee has said it will not accept. These principles are translated into statutory formulae by means of specific Ad Hoc Committee proposals described in the following sections.

SECTION 3 -- Limited Copying and Recording for Educational Use

Since 1909 the copyright law has specifically contained the "not-for-profit" principle, authorizing the nonprofit public performance of nondramatic literary and musical copyrighted works without requiring consent from the copyright owner. This "not-for-profit" provision protected educational uses.

Pending copyright bills destroy this basic doctrine, and substitute categorical exemptions set forth in §110 of H.R. 2512-S.597. The Ad Hoc Committee believes this to be an unwholesome retrogression contrary to public interest. On this score, the present law better serves the public interest in its broadest reach, by distinguishing between nonprofit and commercial uses of copyrighted materials and recognizing a special and primary right for such nonprofit uses. The failure of current copyright bills to make the vital initial distinction between nonprofit and commercial users is, according to Ad Hoc, a serious blind spot in the current copyright revision effort.

The Ad Hoc Committee believes that Senator John L. McClellan, Chairman of the Senate Subcommittee that held copyright hearings, expressed the wiser view of public policy:

> ". . . Once they put it out on the market, as long as somebody does not duplicate it for sale, in my judgment, so long as it is being used for educational purposes and for nonprofit entertainment, I do not think they are entitled to royalty when it is used for that purpose."[1]

The revision program was not always so defective. In his 1961 Report the Register accepted and espoused continuance of the

developed and continued, education improved and America's publishers prospered as perhaps never before in history. Their securities are among today's "hot items" in the stock market--and this despite (or perhaps because of) the very educational practices we are discussing. Legitimitizing such and other similar creative teaching practices is good for both producers and users of copyright materials, as the CHICAGO TRIBUNE wrote editorially in connection with the Ad Hoc Committee's position:

> ". . . permitting educational, not-for-profit circulation of an author's writings might serve the writer better than an iron-clad prohibition of such circulation without written permission. After all, an author's rights do not amount to much if no one wants to read what he has written -- if no one has ever heard of him. Perhaps the school mimeograph should be viewed not as a piratical rival to a trade publisher, but as a helpful, unpaid publicity agent who helps publishers' long-term sales . . ."[5]

The Ad Hoc Committee does not believe that educational institutions should have unlimited free use of all copyrighted works without restriction. But by the same token, it does believe that public policy requires reasonable limitations upon the copyright monopoly for nonprofit educational uses in the public interest (and has submitted to Congress appropriate statutory language to this end). The Ad Hoc Committee believes that such educational uses are not only of value to the users and the public, but also to the authors. Education represents not only users, but also authors and publishers of copyrighted material.

In summary, the Ad Hoc Committee believes that education wants a copyright law which

(1) supports, rather than undermines, good teaching and learning practices;

(2) recognizes the primacy of the public interest over the author's, while striking a fair balance between authors and users;

(3) legislates specific protections for nonprofit education uses, including limited copying and recording of copyrighted materials in the classroom, educational broadcasting and educational technology, without need for clearances or royalties;

(4) provides maximum reasonable access to a wide variety of

paradoxes of a statute which, after 56 years, still presents dozens of unanswered questions."2/

This same view was urged by NEA's President:

"Now that the law is at long last being revised, we urge that it be written to fit the practice rather than cut good teaching practices back to conform to the law. The law should support good practice rather than restrict it."3/

To achieve the goal of having a copyright law "support good [teaching] practice rather than restrict it," special heed must be paid to the nature of teaching today.

As T. M. Stinnett, Assistant Executive Secretary of the NEA, advised the Senate Subcommittee:

"Earlier teachers tended to use the same textbooks for each pupil; today's teacher uses many resources in his teaching. He has a variety of texts and supplementary materials, including trade and reference books, newspapers and magazines, educational motion pictures, filmstrips, overhead transparency projectors, record players, slides and educational radio and television, Teaching machines programmed learning materials; and he uses these in orchestration to do specific jobs. The teacher selects resources to fit particular student needs so that certain tools are used with some students and other tools with other students."4/

The copyrighted works most needed by teachers are recent and contemporaneous materials, not text books. Teachers want to update texts and to have their classwork relevant and meaningful to current developments. It is because of such materials, and because of the newer educational technologies that most of education's copyright problems arise.

Consequently, a major issue of public policy in copyright law revision is the need to legitimitize current and developing reasonable educational practices so that teachers will not be forced either to drop them or to continue them "under the table."

It is well to note that while these educational practices

(1) "Educators want authority for nonprofit, noncommercial educational instructors to make reasonable use of a copyrighted work for nonprofit educational purposes without the need to obtain clearances or pay royalties for such use. Educators want, and need, both a reasonable and a workable copyright law so teachers will readily know what they can or cannot do in using copyrighted materials under the law."1/

(2) ". . . we should like to reiterate that there are certain needs of education which must be protected in any revision of the copyright law. These might be best summarized in this manner: The need to make limited copies of materials for classroom use; the need to have 'fair use' extended to include educational broadcasting and educational use of computers; the need for reasonable certainty that a given use of educational materials is permissible; the need for protection in the event teachers and librarians innocently infringe the law; the need to meet future instructional requirements by utilizing the new educational technology now being made available to schools; and the need to have ready access to materials."2/

Unfortunately, good teaching practice may not always be legal copyright practice. For years, widespread use has been made of many creative teaching practices with scarcely a thought (by either copyright proprietors or teachers) of their copyright implication. But now the issue has been joined, and law suits have been threatened over some of the very teaching practices which have grown up and remained unchallenged under current copyright law. As a result, many school boards and supervisors fear that the failure to assure the legality of basically sound and reasonable teaching practices will curtail and handicap creative and imaginative teaching seriously.

The issue facing Congress today is not what is or is not legally permissible under the 1909 copyright law, but what should be allowable under a new law. As the Register told the Senate Subcommittee:

"There is little point now in detailing the ambiguities, obscurities, omissions, and

57.

Midwest Program on Airborne Television Instruction. The statement "noted with deep concern the following unwholesome and undesirable developments in copyright revision: 1. Proposed elimination of 'for profit' limitation . . . 2. Dilution of 'fair use' . . . 3. Duration of copyright . . .." The Ad Hoc Committee's statement proposed a special, but limited, educational exemption.

Another presentation by Ad Hoc was made before the Panel of Consultants, in New York City, on August 6, 1964.

I. Since the first public appearance of Ad Hoc Committee representatives, the Ad Hoc Committee has testified before the respective subcommittees of the House and Senate Judiciary Committees. In such instances, and with the consent and cooperation of the Congressional committees, the Ad Hoc Committee sponsored a panel discussion form of testimony in which a group of people were heard, representing different interests and problems in education, appearing under the general umbrella of the Ad Hoc Committee.

SECTION 2 -- What Education Wants From The Copyright Law

The Ad Hoc Committee believes that the current copyright law, enacted in 1909, needs revision and updating but opposes any revision which damages or unduly restricts the creative educational process in America's nonprofit school system.

The present copyright law (in the "not-for-profit" provision) gives special recognition and specific authorization for nonprofit educational uses of copyrighted educational material. The Ad Hoc Committee believes (1) that the new copyright law should continue this long-established and beneficial policy by providing special recognition and specific authorization for nonprofit educational uses in classrooms, educational broadcasting and educational technology; (2) that no copyright revision should be enacted unless it is reasonable, just and equitable in striking a fair balance between authors as the creators of copyrightable material and education as users; and (3) that copyright law revision efforts to date have been unbalanced and heavily weighted against the public interest represented by the nation's schools as users of copyrighted materials.

The Chairman of the Ad Hoc Committee succinctly stated what education wants from a copyright law:

C. Thus began the Ad Hoc Committee. It is not an NEA committee, but a multi-member committee of which NEA is a member.

D. Since that first meeting on September 5, 1963, there have been more than 30 plenary meetings of the Ad Hoc Committee as a whole. Generally they have met at the NEA headquarters in Washington, but other meetings have taken place at the Washington headquarters of the American Council on Education, and in New York City.

Meetings were conducted on the basis of advance agenda. New problems and issues were discussed, and old decisions and issues reassessed as circumstances required. Each consensus and each action representing the Ad Hoc Committee was discussed and voted at a plenary Ad Hoc Committee meeting.

E. In addition to plenary sessions of the Ad Hoc Committee, there have been countless meetings of Ad Hoc Committee groups such as special task forces, the attorneys' committee, the research committee, and other designated subcommittees. In addition, the Chairman has kept the membership advised by continuous memoranda, reports, letters, personal conferences, speeches at meetings, and individual and conference telephone calls.

F. Either in plenary session, or through special task forces or subcommittees, the Ad Hoc Committee has conferred with a variety of interested groups, such as trade and textbook publishers; music publishers; authors; librarians; the copyright bar; producers of films and other audiovisual material. In addition, there have been many conferences and meetings with a wide variety of educational groups and interests. Besides the many discussion meetings with the Register and his staff, Ad Hoc has participated in two structured briefing sessions for the Copyright Office, one on educational broadcasting (held at WETA, the ETV station in Washington) and another on non-broadcast uses of copyrighted educational materials.

G. The views expressed and actions taken by the Ad Hoc Committee represent a basic minimum position on which a consensus was reached.

H. The first public appearance of representatives of the Ad Hoc Committee took place on January 13, 1964 in a statement presented at the Panel of the Register of Copyrights by Harry N. Rosenfield, Esq., a Washington attorney. He was accompanied by Dr. Wigren; Dr. Fred Siebert, Michigan State University (a consultant to The American Council on Education); Eugene Aleinikoff, Esq., National Education Radio and Television Center; and Raymond Larrese, Esq.,

"RESOLVED that the participants in this conference express their vital concern in the proposed revision of the Copyright Law, especially as it affects education both as a producer and consumer of copyrighted material;

and support the efforts of the NEA in seeking clarification of fair use by educational users of copyrighted materials."

F. The representative of the American Council on Education suggested establishment of an ad hoc committee of various organizations in order to present a unified position for education before the Register of Copyrights in his meetings with his Panel and in his draft of a proposed revision of the copyright law.

G. As a result of this Conference, Dr. Wigren took two actions:

1. On July 24, 1963, he wrote to the Register advising him of the Conference and its resolution of concern over copyright law revision; and

2. On August 12, 1963, he called the first meeting of an ad hoc committee for September 5, 1963.

II. The Ad Hoc Committee

A. The first meeting of the Ad Hoc Committee took place on September 5, 1963 in Washington. The letter of invitation, addressed by NEA to representatives of national educational organizations, called for a "working group" to spend the whole day as follows:

"Our main purpose will be to examine in detail the law, and the proposed revision of the law, so that we can determine their implications for education. This would seem advisable before we come up with a 'position' . . .. The ad hoc committee will be strictly advisory, and it is our hope that we might be able to arrive at a unified position for education in dealing with these matters."

B. At this meeting, Dr. Harold E. Wigren was elected Chairman of the Ad Hoc Committee, a position he has held continuously since then.

classroom and on television (printed materials, graphics, and filmed or televised materials)."

C. On June 11, 1963 the National Education Association held a staff meeting attended by 18 staff members and a private attorney who had been requested to study the copyright matter and to pinpoint the areas of possible interest to education. On June 12, 1963 NEA's Executive Secretary wrote to the Register of Copyrights as follows, in part:

> "We believe that the public interest requires that there be a maximum of adaptability of materials for educational use, and that any new copyright policy which might be formulated, enacted and administered should protect and preserve the public interest in sound and effective education."

Dr. Carr's letter also advised the Register that NEA was conferring with other organizations.

D. On July 23, 1963 the National Education Association called an exploratory Conference on Copyright Law Revision, under the joint sponsorship of NEA's Division of Audiovisual Instructional Service and NEA's National Commission on Professional Rights and Responsibilities. The invitation from Dr. Harold E. Wigren, NEA's Educational Television Consultant, read in part:

> "At this meeting, we would like to apprise you of some of the developments with respect to revision of the copyright law and discuss with you some implications these may have for educational institutions or organizations. We are calling this meeting so that we may share with you a tentative position which the NEA plans to take in these proceedings [the Panel sessions of the Register of Copyrights] and to obtain your thinking thereon."

Fifty-two individuals representing 47 national educational organizations attended this meeting.

E. Upon motion of the representatives of the College English Association, seconded by the representative of the National Catholic Educational Association and the National Catholic Welfare Council, the Conference adopted the following resolution:

SECTION 1 -- The Ad Hoc Committee

The Ad Hoc Committee (of Educational Institutions and Organizations) on Copyright Law Revision [hereinafter referred to as "The Ad Hoc Committee"] is composed of 35 constituent organizational members, all of which have highly respected leadership roles. The Ad Hoc Committee's constituents cover the entire spectrum of education. It is one of the most widely representative educational groups in America today. As its Chairman, Dr. Harold E. Wigren, stated before a Senate Subcommittee:

> "It is not often that educational groups appear with such a united front before committees of the Congress. It is not often that all these groups with such diverse interests sit on the same side of the table in presenting education's needs and consensus . . .. This is one of the most amazing examples of ecumenical spirit in educational history."[1/]

The 35 organizations which are members of the Ad Hoc Committee are listed in Exhibit 1.

I. Developments Leading to Establishment of the Ad Hoc Committee

A. The present copyright law was enacted in 1909. Over the years there have been many efforts to update this law. The most recent started in 1955 when Congress initiated a program looking toward copyright law revision. This program started with the preparation (under the Copyright Office's aegis) of 35 studies on the principal issues in copyright revision. In 1961 the Register issued a Report with recommendations. Then followed a series of meetings with a Panel of Consultants looking to development of a draft bill. By 1962-63 this process was coming to fruition and a draft revision bill was emerging.

B. In March of 1962 the National Education Association called a national conference dealing with the professional, legal and ethical problems arising for teachers in connection with the expanded use of new technological developments in education. One of the four major areas designated by that Conference for further exploration in depth was the following:

> "Copyright problems relating to the use, recording, and re-use of materials in the

FOREWORD

This paper is designed to outline the views of the Ad Hoc Committee [of Educational Institutions and Organizations] on Copyright Law Revision on the major problems of copyright law revision, particularly in relation to emerging instructional technology.

The views herein expressed are the author's and are not an official expression of the Ad Hoc Committee, although obviously the author has sought to provide an accurate expression of the current views of the Ad Hoc Committee.

HARRY N. ROSENFIELD

Washington, D.C.
November 1, 1968

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MAJOR PROBLEMS OF COPYRIGHT LAW

AS VIEWED BY

THE AD HOC COMMITTEE ON COPYRIGHT LAW REVISION

By

Harry N. Rosenfield, Esq.

1969 Addendum

Despite earlier optimistic hopes, copyright revision hit a snag on its way through the Senate in 1968. CATV, in all of its ramifications, assumed center stage—and what with the pending Supreme Court proceedings in the *Fortnightly Case*, the inaction of the House Interstate Commerce Committee after House copyright bill passage, attendant delays on CATV within the Federal Communications Commission etc., the Senate Copyright Subcommittee announced its reluctance to proceed with a new copyright act as a whole until a *modus vivendi* could be reached between the various conflicting CATV interests.

As a result, the Copyright Bill passed by the House died at the end of the last Congress. The legislative process must now be begun over again with the initiative this time up to the Senate. Senator McClellan, Chairman of its Copyright Subcommittee, has committed himself to action this year, apparently hoping to avoid further hearings as far as possible. In this respect, too, there has been little indication of any inclination on the part of the Senate Subcommittee to refuse to accept the plenary House grant of the broadest possible educational television grace.

Once more, then, we in educational television can look forward to acceptable copyright revision towards the end of the year. It should actually be quite helpful for school and college telecasts, although some new clearance problems may be created for public television as a whole. We continue to stand by our earlier proposals towards what we consider to be a practical solution to a soluble problem, and can only hope that time has also mellowed the copyright industry in our behalf.

cational television.[10] This onslaught was so determined that the Copyright Office found it politic to neutralize its earlier status quo stance, and to present in its first overall copyright revision draft in 1963 two alternatives—one including and the other excluding ETV from the general educational performance exemption, and neither with provision for educational copying or recording.[11]

The awakening of the previously dormant educational community was surprisingly swift. Most of the principal national educational organizations, led by the National Education Association, formed themselves into an Ad Hoc Educational Committee on Copyright aimed specifically at protecting overall educational interests in the copyright revision proceedings.[12] For school teachers and university professors alike, the absence of any statutory copying privilege whatsoever had terrifying possibilities, not the least of which was seen to be preclusion of modern teaching methods and devices from the classroom and study hall. For the educational broadcasters, not only was defense of their historic broadcasting freedom essential; also economically and technically indispensable was the ability to record programs easily on film and tape for distribution and transmission purposes.

Succeeding Copyright Office revision drafts, supplementary reports, panel discussions, and plenary conferences served only to emphasize the sharply opposing viewpoints of the copyright and educational representatives on what was the appropriate balance between private copyright interests and public educational needs.[13] It was in this atmosphere that the scene changed to the halls of Congress in 1965. There, after several weeks of public hearings and several months of committee deliberations, the House of Representatives' Judiciary Committee introduced in the Eighty-Ninth Congress a full-scale copyright revision bill containing what was hoped to be an acceptable educational compromise.[14] In line with the Copyright Office's recommendations, the "for profit" concept was to be eliminated from the copyright law. But, by authorizing broad classroom copying practices under a statutory "fair use" endorsement, the Committee's Report reflected much ingenuity and enterprise in substantially satisfying the basic desiderata of both teachers and publishers.[15]

Not so, however, for educational television. For after a rather cursory deprecation of the applicability of the "fair use" doctrine to such an expansive and expensive medium as television,[16] section 110 (2) of the House bill limited the ETV copyright exemption to instructional broadcasts prepared by school systems for classroom viewing. Having thus excluded the non-school programs

[10] See, for example, the comments of the Joint Copyright Committee of the American Book Publishers Council and the American Textbook Publishers Institute dated March 19, 1962 (as revised April 18, 1962), and of the American Guild of Authors and Composers dated July 25, 1962, reprinted in REGISTER OF COPYRIGHTS, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, PART 2, DISCUSSIONS AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 226–28, 233, 240 (House Judiciary Comm. Print 1963).

[11] U.S. COPYRIGHT OFFICE, 88TH CONG., 2D SESS., COPYRIGHT LAW REVISION, PART 3, PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW §§ 5(c), 8, at 4–7 (House Judiciary Comm. Print 1964).

[12] The first meeting of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, consisting of some thirty-five regular member organizations, was held in July 1963.

[13] U.S. COPYRIGHT OFFICE, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, PART 5, 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS (House Judiciary Comm. Print 1965); U.S. COPYRIGHT OFFICE, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, PART 6, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (House Judiciary Comm. Print 1965).

[14] H.R. 4347, 89th Cong., 2d Sess. (1965).

[15] H.R. REP. No. 2237, 89th Cong., 2d Sess. 58–64 (1966).

[16] *Id.* at 65.

constituting over half the daily schedule of the average ETV station, the House bill imposed prohibitory conditions on school broadcasting as well. Section 110 (2) (B) artificially limited instructional broadcasts to a circumscribed area of one hundred miles—or not much larger than the usual signal area of a single television transmitter. Section 112 (b) arbitrarily restricted the instructional exemption to but one broadcast recording for each school program and then insisted that even that recording be destroyed within one year. In other words, all ETV station interconnections were to be prohibited (because any interconnection would necessarily extend beyond the one hundred-mile limit), and no instructional programs were to be available for reuse in subsequent academic years (even if indispensably integrated into the school curriculum) or for extended broadcast by other school systems (even if an admittedly unique educational innovation).[27]

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Understandably, the apprehensions and concerns of the ETV organizations again blossomed and burgeoned. Undeniable was the urgent need to demonstrate conclusively the devastating effects of the proposed restrictions on the purported ETV exemption; factual research and professional study were clearly called for without delay. In the winter of 1966, a comprehensive survey of the use of copyrighted materials over educational channels was undertaken jointly by National Educational Television (NET) and the National Center for School and College Television (NCSCT) —the two most prominent national ETV program distribution agencies.[28] This study, conducted at some thirteen ETV stations of varying ownership, types, and sizes, revealed interestingly that, of over three hundred educational programs broadcast in one day, less than ten would have been exempt under the combined provisions of the proposed sections 110 (2) and 112 (b). The NET-NCSCT ETV Copyright Survey also indicated the wide extent to which music appears before, on, and after all ETV programs, how photographs and similar visual materials permeate ETV programming, and that these and other types of copyrighted works are commonly included in ETV broadcasts without permission asked or required.

Complementary studies were instituted soon thereafter by the National Association of Educational Broadcasters (NAEB). A survey of educational radio stations by the NAEB's Educational Radio Stations Division led to similar findings, more serious in outlook due to the miniscule operating budgets commonly enjoyed by educational radio stations.[29] An independent economic report prepared for the NAEB Educational Television Stations Division arrived at the astounding figure of $50,000 per year as the estimated overall cost of the proposed House bill to each of the more than one hundred ETV stations throughout the nation.[30] Both studies emphasized once more the inherent danger of precluding copyrighted material from the educational airwaves as inhibitory to educational content and discouraging to professional production.

While it is never easy to calculate direct impact on congressional deliberations, the fact remains that although the House approved most of the revision bill when it reached the floor in the Ninetieth Congress,[31] it reacted most unfavorably to the proposed ETV restrictions. First to suffer concerted breach was the one hundred-mile broadcast barrier, which was effectively eliminated prior to pas-

[27] *Id.* at 69-75, 91, 92.

[28] National Educational Television and the National Center for School and College Television, Educational Television Copyright Survey (February 1967).

[29] National Educational Radio Division, NAEB, Educational Radio Copyright Survey (March 1967).

[30] Educational Television Stations Division, NAEB, The Economic Impact of the Proposed Copyright Law Upon Educational Television Broadcasters (prepared by M.H. Seiden Associates, March 1967).

[31] H.R. 2512, 90th Cong., 1st Sess. (1967); H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967)

sage of section 110 (2).[28] By similarly determined efforts, section 112 (b) was explosively expanded to remove all limitations on the number and life of ETV program recordings.[29] In essence, under the ultimate bill enacted by the House, non-commercial television stations are not subject to tax or refusal by copyright owners for the non-dramatic musical, literary, and pictorial material included in instructional broadcasts over their facilities.[30]

The final House version has thus endowed educational television with a large measure of the flexibility necessary to service adequately the schools and colleges across the nation. Instructional telecourses can be researched more extensively, prepared more carefully, and produced more proficiently if they are planned for use throughout a wide geographic area and over a considerable period of time. State and regional networking will add immeasurably to local program resources; national distribution centers can provide inestimable assistance in achieving higher program quality.[31]

One additional gratification has been the recognition that the instructional television exemption in section 110 (2) should apply broadly to all school lessons and college courses, whether produced for classroom viewing or home study, addressed to children or adults, designed for intellectual interest or for practical training. The high school dropout may now be reached at home or in special locations; the housewife can continue her education without leaving her small children; and professional practitioners can pursue post-graduate studies in their offices. The "College of the Air" can take its rightful place in the development of adequate educational institutions to meet the requirements of the anticipated population explosion.[32]

Encouraged as they are by the House action with respect to the formalized instructional process, educational broadcasters must still be concerned about the informational and cultural programs broadcast for more general audiences

[28] 113 CONG. REC. 3863-865 (daily ed. Apr. 11, 1967); Subsection (B) of section 110(2) was deleted in entirety, and the subsequent subsections redesignated accordingly.

[29] 113 CONG. REC. 3866-867 (daily ed. Apr. 11, 1967). Section 112(b) was amended to read:

Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make copies or phonorecords of a particular transmission program embodying the performance or display.

[30] As so amended in the House, H.R. 2512 was referred to the Senate Judiciary Committee on April 12, 1967, in the course of its hearings, *Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967), the counterpart of the original House bill.

[31] See the extensive testimony of the representatives of the educational broadcasting organizations before the House Judiciary Committee's Copyright Subcommittee on June 6, 1965, in *Hearings before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess., ser. 8, pt. 1, at 473-535 (1965).

[32] Congressman Richard H. Poff of Virginia, ranking minority member of the House Judiciary Committee's Copyright Subcommittee, explained the scope of section 110(2) on the House floor:

There has been some question as to whether or not the committee intended in this section of the bill to include instructional television college-credit courses. These tele-courses are aimed at the undergraduate and graduate students in earnest pursuit of higher educational degrees who are unable to attend daytime classes due to daytime employment, distance from campus, or for some other intervening reason. So long as these broadcasts are aimed at regularly enrolled students and conducted by recognized higher educational institutions, the committee believes that they are clearly within the language of section 110(2) (C) (ii). Like night school and correspondence courses before them, these telecourses are fast becoming a valuable adjunct of the normal college curriculum.
113 CONG. REC. 3613 (daily ed. Apr. 6, 1967).

over educational television in non-school hours. These range widely in content and format—from film documentaries to cooking lessons, from symphony concerts to guitar instruction, from political interviews to children's stories.[*] Many of these afternoon and evening programs are locally produced, but the most ambitious are usually made available by a wide variety of centralized ETV agencies, which currently distribute principally through free circulation of program recordings and increasingly by network interconnection.[*] While noncommercial and educational in nature, the copyright revision bill passed by the House accords to this type of public television programing no copyright privileges greater than those enjoyed by American commercial television for its sponsored entertainment and amusement shows.

Yet the copyright problems of public educational television differ almost as much as its basic programing does from commercial television. Commercial production is mainly centralized in the three dominant commercial networks, each of which has large advertiser-supported funds for copyright royalties and clearance staffs. Since most commercial hours are devoted to fictional series, game shows, feature movies, and variety shows, particular copyrighted materials are less indispensable and more replaceable when clearance difficulties occur. And, perhaps most important, as the commercial television companies have become diversified in other fields—such as phonograph records, book publishing, motion picture production—their corporate interests loom larger as copyright proprietors than as copyright users. The result is that customary commercial procedures have turned out to be somewhat inadequate for educational programing.

In the music field, for example, commercial television early adopted the prior commercial radio pattern of annual ASCAP and BMI broadcasting licenses. But these blanket licenses do not cover the mechanical or synchronization rights necessary to record as well as broadcast television programs.[*] Though the music publishers have uniformly permitted program pre-recording for original broadcast without additional fee, they have always maintained their right to license recording rights for program rebroadcast separately from the performing rights societies.

Program recording and reuse are integral to educational broadcasting. Accordingly, if the commercial pattern were also to be applied to ETV, each piece of music in the same program would always have to be licensed twice, through two different agencies and at double fees, although the ultimate copyright holders and royalty recipients are identical. This ETV predicament has been avoidable up to now only because of the "for profit" performance exemption; absent that assistance, educational broadcasters cannot but fear that they may suddenly find themselves virtually barred from all but public domain music.[*]

Faced with this prospect, the educational broadcasters have attempted over

[*] In its far-reaching report published in January, 1967, the Carnegie Commission on Educational Television denominated this type of ETV programming as "Public Television", defined broadly as "all that is of human interest and importance which is not at the moment appropriate or available for support by advertising, and which is not arranged for formal instruction". Carnegie Commission on Educational Television, Public Television—A Program for Action, Introductory Note (1967).

[*] *See generally* Morse Communication Research Center, Brandeis University and the National Center for School and College Television, One Week of Educational Television (No. 4 Apr. 17-23, 1960).

[*] The antitrust consent decree under which it operates has for many years expressly prohibited ASCAP from acquiring or licensing television recording rights in musical compositions on behalf of its member authors, composers, and publishers. United States v. ASCAP, Civil No. 13-95 (S.D.N.Y. 1950).

[*] Well remembered is the similar plight of the commercial broadcasters in their dispute with ASCAP prior to organization of BMI in 1941. Howell, Copyright Law 116 (A. Latman rev. ed. 1962).

the past few years to explore seriously the possibility of combined licensing of broadcasting and recording rights. Ingrained habits, unshakeable inertia, and undeniable self-interest, however, for a long time blocked that unanimity of approval by the major music publishers which would permit such a mutual arrangement to go forward. Hence, despite ACSAP's frequent optimistic announcements, attainment of an arrangement has been very difficult without additional external impetus or internal motivation.

Photographs present equally severe problems for educational television producers—not so much because of the industry structure in this case as of the unfortunate lack of clearance machinery. Permission for ETV use of a published photograph is usually a multi-step, time-consuming process in which the publication must be researched, the photographer identified, he or his agent contacted, a fair price negotiated, and acceptable conditions of use established. All this may well vary from picture to picture of the same, let alone different, photographers. Except in rare cases, the time and effort required have seldom permitted the procedure to be followed to conclusion in the course of actual ETV production; the photograph usually has been either discarded or used without clearance in the hope of cover from the "for profit" exemption or "fair use" doctrine. With the elimination of the former and the circumscription of the latter in the new revision bill, photographic clearances will become unmanageable for all but a few large national ETV production centers. Similar conditions exist today in trade and textbook publishing, and can be expected with respect to phonograph records once subject to copyright as proposed in the revision bill.

It is not hard to see why, in the intensely competitive publishing industries, copyright proprietors might prefer individual discretion to collective arrangement. Indeed, the antitrust laws might well be regarded as compelling such an attitude. On the other hand, the educational broadcasters' apprehension of uncontrolled copyright monopolies is equally real. Bargaining scales cannot be considered evenly balanced when the ETV producer must seek out and obtain rights at all costs, but the copyright proprietor need not consider or grant a license for essential program material. Nor have any statutory schemes for compulsory licenses, clearing houses, published rate schedules, computerized payments, or other methods yet been devised which would give the educational broadcasters convincing assurance of prompt and reasonable availability of copyrighted materials under all of the complex and diffuse circumstances involved.

As a result, a new ETV note has been struck in the Senate Copyright Revision hearings—one that, for want of a better title, might be called "clearance incentive."[31] This latest ETV proposal is designed to assist both sides in working out their own clearance problems in the most practical way. What has been suggested is the imposition of an initial obligation on the ETV broadcaster to request a license for nonexempt copyrighted material, followed by the reciprocal obligation of the copyright owner to indicate acceptable terms and conditions promptly, so that an appropriate license can be fairly negotiated between the two in time for broadcast. If no agreement is reached, a reasonable royalty could be assessed in an infringement suit: should the ETV broadcaster have failed to request a license before use, treble royalties could be imposed; should the copyright owner have failed to reply, no royalty would be payable.

This new ETV suggestion seeks only a reasonable availability of copyright material for use by public television; it is motivated by a desire for mutual solution of a difficult problem. While the ETV proposal on its face may appear complicated to administer and an unnecessary cause of multifarious litigation

[31] See the statements of educational television representatives before the Senate Judiciary Committee's Copyright Subcommittee on March 16, 1967 and April 12, 1967, in *Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 1 at 213-36, pt. 3 at 980-1041 (1967).

in the federal courts, its ultimate achievement should be quite the opposite. Once the ETV broadcasters have become better attuned to their clearance requirements and the publishers more cognizant of their clearance responsibilities, it can be assumed that royalty patterns will inevitably develop, stereotype license forms abound, and standard contractual arrangements eventuate—all of which will go far towards simplifying procedures and avoiding endless individual negotiations and law suits.

Both the broadcasters and publishers have a strong interest in minimizing administrative costs—the broadcasters because of their limited staffs and finances, and the publishers if for no other reason than the comparatively insignificant financial return that can be expected from public television licenses for some time to come.[32] Educational broadcasters must be irresistibly drawn to the course that leads to easier and wider availability of copyrighted materials on their prime-time programs. The copyright industry must come to the realization that the day of denial, especially for educational purposes, is rapidly drawing to a close, so that its self-interest lies in payment protection rather than infringement injunction. It is to the mutual advantage of both camps to attain satisfactory solutions for themselves under the watchful aegis of Congress and the courts.

The educational broadcasters have often indicated their willingness to pursue this objective energetically and realistically so long as school instruction is unencumbered and fair use applied without discrimination. Too long, it is felt, have the music publishers and composers, the book publishers and authors, the picture magazines and photographers, hesitated and delayed in meeting the new challenge of a non-commercial medium operated not for private profit but for social gain. Too precarious is the possibility that without legislative sanction copyright proprietors will not always choose or be able to follow their own leadership in arriving at and maintaining practicable arrangements with the educational broadcasters. Yet, that is exactly what the proposed elimination of the present "for profit" exemption would impose upon public television unless affirmative clearance responsibilities rest on copyright owners as well as educational broadcasters. Surely, it is not unfair to ask all to recognize, as has a prominent copyright scholar in a recently published lecture, "that authorship, publishing, education and research are interdependent and mutually supportive."[33]

In the end, as in the beginning, the courses of educational television and copyright revision are running parallel. Last November the Public Broadcasting Act of 1967 was enacted into law establishing a national public television agency specifically designed to advance the progress of educational television in the United States. Passage of the Copyright Revision Act, providing perhaps the most significant recodification of our copyright law, is anticipated this year. Paramount in the policy of both is the public interest, and its protection in an age of communications developments unrivaled in our history. Momentous are both to the future of non-commercial broadcasting as a way of American life.

[32] The incredibly low levels of ETV station operating budgets has been graphically documented in a 1965 report of a study conducted by the Educational Television Stations Division, NAEB, under contract with the U.S. Office of Education entitled *The Financing of Educational Television Stations, Present Patterns and Recommendations for the Future*.

[33] Kaplan, *An Unhurried View of Copyright: Proposals and Prospects*, 66 COLUM. L. REV. 831, 845 (1966).

1969 Addendum

Despite earlier optimistic hopes, copyright revision hit a snag on its way through the Senate in 1968. CATV, in all of its ramifications, assumed center stage—and what with the pending Supreme Court proceedings in the *Fortnightly Case*, the inaction of the House Interstate Commerce Committee after House copyright bill passage, attendant delays on CATV within the Federal Communications Commission etc., the Senate Copyright Subcommittee announced its reluctance to proceed with a new copyright act as a whole until a *modus vivendi* could be reached between the various conflicting CATV interests.

As a result, the Copyright Bill passed by the House died at the end of the last Congress. The legislative process must now be begun over again with the initiative this time up to the Senate. Senator McClellan, Chairman of its Copyright Subcommittee, has committed himself to action this year, apparently hoping to avoid further hearings as far as possible. In this respect, too, there has been little indication of any inclination on the part of the Senate Subcommittee to refuse to accept the plenary House grant of the broadest possible educational television grace.

Once more, then, we in educational television can look forward to acceptable copyright revision towards the end of the year. It should actually be quite helpful for school and college telecasts, although some new clearance problems may be created for public television as a whole. We continue to stand by our earlier proposals towards what we consider to be a practical solution to a soluble problem, and can only hope that time has also mellowed the copyright industry in our behalf.

a matter of statute,[3] and that copyright is only a privilege or a franchise.[4] Under Supreme Court rulings it is settled law that any copyright right is simply a creature of statute.[5] As distinguished from literary property, copyright is wholly a matter of Congressional discretion to grant or to withhold.[6] This doctrine was reaffirmed by the Supreme Court this year in the CATV case, when it ruled:

> "The Copyright Act does not give a copyright holder control over all uses of his copyrighted work. Instead, §1 of the Act enumerates several 'rights' that are made 'exclusive' to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these 'exclsive rights', he infringes the copyright. If he puts the work to a use not enumerated in §1, he does not infringe."[7]

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3. Miller Music Corp. v. Daniels, Inc., 362 U.S. 373, 375 (1960); Bentley v. Tibbals, 223 F. 247, 248 (C.A.2d 1915); Grant v. Kellogg Co., 58 F.Supp. 48, 52 (S.D. N.Y. 1944), aff'd 154 F.2d 59 (C.A. 2d, 1946).

4. Local Landmarks v. Price, 170 F.2d 715, 718 (C.A. 5th, 1948).

5. American Tobacco Co. v. Werckmeister, 207 U.S. 284, 291 (1907); White-Smith Music Pub. Co. v. Apollo, 147 F.226, 227 (C.A. 2d 1906), aff'd 209 U.S. 1, 15 (1908). See also Loew's Inc. v. C.B.S., 131 F.Supp. 165, 173 (1955), aff'd 239 F.2d 532 (C.A. 9th 1956), aff'd by equally divided court, 356 U.S. 43 (1958)

6. Kraft v. Cohen, 117 F.2d 579, 580 (C.A. 3d, 1941); Keene v. Wheatley, 14 Fed.Cas. 180, 185 #7644 (Cir.Ct.Pa. 1920).

7. Fortnightly Corp. v. United Artists Television, Inc., U.S. , 20 L.Ed.2d 1176, 1180 (June 17, 1968). Footnote 8 of the Court's opinion read, in part, as follows:
8. "'The fundamendal [is] that "use" is not the same thing as "infringement," that use short of infringement is to be encouraged . . .,' Kaplan, An Unhurried View of Copyright 57 (1967)."

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EXHIBIT 6

Copyright and the Constitution

There are those who argue that copyright is a property right and that therefore Congress has no authority to limit such property right. This simply is not so. Article I, §8 of the Constitution grants no rights to authors; it merely grants power to Congress to enact copyright legislation. The Supreme Court so ruled in the very first case in which it considered this problem. In Wheaton v. Peters, 8 Pet. 591, 661 (1834), counsel for complainants insisted that the constitutional provisions did not originate a right but merely protected one already in existence. The Supreme Court specifically rejected this argument:

> "Congress then, by this act, instead of sanctioning an existing right, as contended for, created it. (661) . . . This right, as has been shown, does not exist at common law--it originated, if at all, under the Acts of Congress." (663) 1/

The House Report on the current Copyright Law of 1909 also made this same point crystal clear:

> "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights. . . . The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best." 2/

There is a long and uninterrupted line of cases that hold unequivocally that copyright protection is completely and solely

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1. To the same effect, see Mazer v. Stein, 347 U.S. 201, 214 (1954); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); Caliga v. Inter Ocean Newspaper Co., 215 U.S.182, 188 (1909).

2. House Report No.2222, 60th Cong., 2d Sess., p.7.

EXHIBIT 5

Copyright Duration

One of the principal reasons advanced for the proposal for a copyright duration of life-plus-50, which is a radical departure from established American copyright renewal and duration practice, is the alleged necessity for conformity with the copyright law in many foreign countries. There are many answers to this enforced conformity of our law to foreign law:

First, the U.S. Constitution sets our copyright law apart from all foreign copyright laws. The Constitution permits copyright only "for limited times." The Copyright Act passed immediately after the adoption of the Constitution regarded 14 years as a limited time for initial terms, and the patent law (which comes under the same Constitutional provision) still has only a 17-year term. Thus, the drive for conformity to foreign laws seems to ignore the fundamental limitation in our Constitution which must prevail regardless of foreign laws.

Second, the best interests of the American people must prevail over any mechanical concept of conformity to foreign law. Such conformity is detrimental to the interests of some 45,000,000 school children of America.

Third, adoption of conformity-to-foreign-law as a principal basis for copyright law revision is a dangerous precedent. For example, most foreign countries have no copyright notice requirement except for special kinds of works.[1] Also, major foreign countries have no system of copyright registration and deposit of copyright material.[2] By adopting the conformity-with-foreign-laws rationale, do we say that henceforth copyright notice and copyright registration and deposit will also be eliminated although notice has been part of our copyright law since 1802 and registration since 1790?

Fourth, the proposed term of life-plus-50 is unnecessary, according to the Register's 1961 Report, even if Congress wants to make our maximum term generally comparable to that given American works in other countries. All that is necessary, the Register said, and Ad Hoc agrees, is to increase the total term from the present 56 years to 76.[3]

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1. Goldman, Abe A., Copyright Law Revision and Music Librarians, LIBRARY JOURNAL, March 15, 1965, p.1263.

2. Register's Report (1961), p.73.

3. Ibid., p.51.

(B) fixed on film, tape, disc and/or other copying devices for transmission or re-transmission purposes;

and said interconnection and fixation processes shall be deemed integral parts of the educational transmissions subject to subsections (a), (b), and (c) respectively.

continuous audio-visual work is actionable as an act of infringement under Section 501 and is fully subject to the remedies provided by Sections 502 through 506.

(c) Limitation of Liability for Certain Educational Transmissions--

With respect to an educational transmission embodying the performance or display of a copyrighted work outside the scope of subsection (a) or (b), liability for infringement under Section 501 does not include the remedies provided in Sections 502, 503, and 506, and the remedies included in Sections 504 and 505 are limited to recovery of a reasonable license fee as found by the court under the circumstances of the case, except as follows:

(1) Where the court finds that the infringer either has failed to make a timely request for a license or has not accepted a timely offer of a license for a reasonable fee, it shall award as statutory damages under Section 504(c) the sum of not less than $100 nor more than three times the amount of a reasonable license fee as the court considers just, to which may be added a discretionary award of costs and attorneys' fees under Section 505;

(2) Where the court finds that the copyright owner either has failed to make a timely reply to a request for a license or has not made a timely offer of a license for a reasonable fee, it may reduce or withhold any award of damages under Section 504 and may, in its discretion, award to the infringer costs and attorneys' fees under Section 505.

(d) Definitions --

As used in this section:

(1) "Educational transmissions" shall mean public broadcasts over noncommercial educational television and radio stations operated by nonprofit educational organizations under license by the Federal Communications Commission or other appropriate agency;

(2) "Educational transmissions" shall not be precluded from the provisions of this Section ____ by virtue of being:

(A) relayed from, forwarded to, converted into or otherwise interconnected with other educational transmissions or re-transmissions by wire, radio or other communication device; or

EXHIBIT 4

Proposed New Section on Educational Broadcasting

to be substituted for Sections 110(2) and 112(b)
of H.R.2512 -- S.597

§____. Limitations on Exclusive Rights: Educational Transmissions

(a) Certain Educational Transmissions Exempted --

An educational transmission embodying the performance or display of a non-dramatic musical, literary, pictorial, graphic or sculptured work is not an infringement of copyright if:

(1) the content of the transmission is a regular part of the systematic instructional activities of a governmental body or nonprofit educational institution;

(2) the performance or display of the copyrighted work is directly related to the teaching content of the transmission and is of material assistance to the instruction encompassed thereby; and

(3) the transmission is primarily for:

(A) reception in classrooms or similar places normally devoted to instruction, or

(B) reception by students regularly enrolled in nonprofit educational institutions, or

(C) reception by persons other than regularly enrolled students to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places similarly devoted to instruction, or

(D) reception by governmental officials or employees in connection with their official duties or employment.

(b) Certain Educational Transmissions Fully Actionable --

An educational transmission embodying the performance or display of a dramatic or choreographic work, pantomime, motion picture or

cation in Science and Education, that fair use was

> ". . . a temporary safety valve until some clearing house system is established. At that time, the concept of fair use should lose its importance and die off as some sort of vestigial tail."[2]

(3) Schools may face the danger of continuous monitoring of classrooms to ascertain the extent and nature of the use of copyrighted material, as a means of administering the system. Schools might also be subjected to unhealthy pressures to use particular materials in order to boost the provider's allocable portion of the clearing house's receipts.

(4) No system so far discussed or proposed meets the following minimum needs of education:

(a) mandatory application

(b) complete coverage of all works in a single system

(c) protection against unreasonably escalated fees

(d) ease of administration within schools.

In any event, whatever the merits of a clearing house arrangement, if any, it in no wise meets the requirements for specific and particular statutory rights and authorizations for education within the copyright law itself, as the Ad Hoc Committee has recommended. A clearing house is not a suitable means for meeting education's needs in a copyright law.

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2. Senate Hearings (1967) p.115.

(c) voluntary Clearing House plan
(This plan was favored by publishers only.)

(d) free use provided by statute unless copyright owner responds within a specific time period to teacher's request for use (User must notify Library of Congress or copyright owners of intended use; if user does not hear within a given period, he may automatically use material.)

(e) publisher publishes his copying rates on back of title page or in a separate catalog.

Plans (d) and (e) were left open at the "summit conferences" for consideration. The first three plans were set aside because of objections of one or another group. Nothing has ever come of this.

Despite all these circumstances, the Ad Hoc Committee adopted a resolution on January 25, 1967, as follows:

"The Ad Hoc Committee

(a) reiterates its position of willingness at this time to consider firm proposals for a clearing house, licensing system, or other alternative method of achieving easy access to copyrighted materials;

(b) will not at this time participate in any group developing such system."

The unsuitability of a clearing house to meet education's needs in using copyrighted materials has emerged from these and other discussions on the subject. There are at least four reasons:

(1) There has been no definite and firm plan which the copyright interests themselves would accept, and no disposition to allow user participation in the control of any such plan.

(2) Such system tends--and may even be designed--to erode fair use instead of being a supplement to fair use.
In this connection it is instructive to note the Senate testimony of one of the strongest supporters of a clearing house, the Committee to Investigate Copyright Problems Affecting Communi-

EXHIBIT 3

Unsuitability of a Copyright Clearing House

Over a period of years, various suggestions have been made for a clearing house as a purported means of meeting education's needs in the use of copyrighted materials for nonprofit educational purposes.

On September 15, 1964, the Ad Hoc Committee in plenary session met with the publishers who proposed a clearing house of licensing system. The Ad Hoc Committee formally suggested that the publishers submit a firm and specific proposal. This was never done.

On January 7, 1965, the Ad Hoc Committee heard a proposal from Irwin Karp, Esq., attorney for the Authors League of America, Inc.,for a statutory licensing system. Nought came of this.

The Committee to Investigate Copyright Problems Affecting Communication in Science and Education was a major sponsor of a copyright clearing house. It testified before the House Subcommittee in 1965 that it was planning to have "a thorough study" to determine "a feasible method for dealing with the problem of use."1/ No such study was ever made.

At one or another time, various subcommittees of the American Bar Association proposed or dealt with suggestions for a clearing house or licensing system. The matter has been the subject of major disagreement between two different ABA subcommittees. Nothing came of these efforts.

At the "summit conferences" in June 1966, the following methods of collection for compensable uses were discussed, beyond fair use:

(a) compulsory licensing system with government control of rates
(No group favored this plan.)

(b) compulsory licensing and stamp plan
(No group favored this plan.)

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1. House Hearings, p.1480

that its meaning and applicability to a given use is uncertain, and that it is legally risky for teachers to rely wholly on fair use.

Quite apart from what may be the technical law, how easy will it be to persuade the ordinary classroom teacher or supervisor, or for that matter the normal school board, that fair use is a meaningful doctrine in the face of the kinds of copyright notices they see on materials they want to use reasonably and responsibly. For example, take this one used by a leading publisher:

> "All rights reserved. No part of this book may be reproduced or utilized in any form, or by any means, electronic or mechanical including photocopying, recording, or by any information storage or retrieval system without permission in writing from the Publisher."

In the face of that "notice," it would take a bold teacher to rely on fair use for anything.

The ultimate effect is either that teachers will surreptitiously use the work "under the table," or not use it at all, to the detriment of the students. Fair use is not a sufficient guideline for the classroom teacher to know when copyrighted materials may be used. Fair use is not an adequate substitute for an automatic, but limited, exemption proposed by the Ad Hoc Committee on the theory of the present law's "not-for-profit" protection to education.

stated in part:

> "However, we are also mindful that 'fair use' is both a limited and an indefinite doctrine . . .. Further, there is no precise way of knowing how much of a copyrighted work can be used in a given situation under the doctrine of fair use. The prospective user would apparently need expert advice to judge each case individually under the provisions set forth in §107, and, even so, there would be the risk of having to defend an infringement suit. . . . we are therefore of the opinion that the doctrine of 'fair use' would not in and of itself, be an adequate answer for educational broadcasting purposes."15/

The Health, Education and Welfare Department's report on H.R.4347 says, in part:

> "1. With no reported judicial decisions on the subject, it would be useful to libraries, authors, publishers, scientists, and researchers to have the permissible limits of photocopying spelled out in the statute.
>
> "2. The failure of a comprehensive revision of the Copyright Law to include a provision on photocopying might be deemed to indicate an intent by Congress not to authorize photocopying by libraries as a limitation on the exclusive rights of a copyright holder."16/

If copyright law experts cannot agree, how can the classroom teacher act safely in such matters? Must he have a "hot line" to his lawyer? The difficulty is complicated by the fact that fair use is determined by courts after the fact, when liability for infringement may already have occurred. It has not been an affirmative doctrine, but rather a defense when a user is sued for infringement. And the teacher relying on fair use has the burden of proving that his use was a fair use.

This is not to say that fair use should be abolished or its scope restricted, but only to note the obvious and painful fact

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15. House Report, p.477.

16. Ibid., p.1133.

is no precise definition. This must be gleaned from reading a number of cases." Another witness in the House hearings said that the solution was a "mutual sort of unspoken understanding." One witness said that "any writer" regards it to be fair use for a teacher to make one or two copies of a work, but two lawyers said that fair use never even allowed one copy of a full work.[11] An author's copyright lawyer even said that copying a work by pencil was an infringement.[12]

An example of the esoteric basis for fair use is the effort of the Register of Copyrights to give examples in his 1961 Report of what he regarded as clearly fair use.[13] But the very example he used caused disagreement with the American Book Publishers Council as to whether fair use consisted of "a part" or only "a small part" of a work. However, this was only the beginning of the confusion. In the later House hearings, the General Counsel of the Copyright Office testified that only "a relatively small" part is permissible as fair use. And the Register's Supplemental Report (May 1965) says that fair use applies only for "the relative insignificance of the excerpt copied."[14] And, to complicate matters even more, the Music Publishers Association of the United States advised teachers they could not use "any part" of any copyrighted work.

Various Federal agencies have submitted reports or testimony on H.R.4347 which also substantiates the difficulty, if not folly, of attempting to rely on fair use in terms of the predictable right to copyrighted material.

The Federal Communication Commission's report on H.R.4347

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11. Senate Hearings, p.134.

12. House Hearings, p.1773.

13. Cf: Senate Hearings, p.123.

14. COPYRIGHT LAW REVISION, Part 6, Supplementary Report of the Register of Copyrights, House Com. Print, 89th Cong., 1st Sess., May 1965, p.34.

Fair Use is so uncertain that the Register of Copyrights advises the public that seeks advice as follows:

> "When it is impracticable to obtain permission, use of copyrighted material should be avoided unless it is clear that the doctrine of 'fair use' would apply to the situation. If there is any doubt or question, it is advisable to consult an attorney."7/

Even expert copyright lawyers disagree on what is and what is not "fair use" in a given set of circumstances. Perhaps the most current example of this is the pending suit by a medical publisher against the U.S. charging that it is not fair use for the National Medical Library of HEW to serve requests for medical journals by sending a photocopy of the article rather than the entire original journal.8/ Apparently the Department of Health, Education and Welfare, the Public Health Service and the U.S. Department of Justice all believe this practice is fair use, but the publisher disagrees.

At one time a distinguished lawyer for publishers virtually insisted that fair use did not include any reprography at all, and even testified that the doctrine of fair use is not generally applicable to advanced technology.9/ This same attorney also testified that: "The doctrine of fair use was never intended to afford certainty of the law."10/

In response to a question from the chairman of the House hearings as to whether there was a judicial definition of "fair use," the General Counsel of the Copyright Office said that "there

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7. Op. cit., supra, note 2, ¶5.

8. Williams and Wilkins v. U.S., U.S. Ct. of Claims, No. 73-68 (2/27/68).

9. Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, 89th Cong., 1st Sess. on H.R.4347, "Copyright Law Revision," pp. 1459.

10. Ibid, p.1433.

EXHIBIT 2

"Fair Use" -- An Uncertain and Unreliable Guide for Teachers

The original, and still prevailing, judgment of the Ad Hoc Committee is that fair use alone is not a reliable and adequate instrument for educators seeking to use copyrighted materials. The Register of Copyrights has said of fair use: "That term eludes precise definition . . ."[1] Elsewhere he officially informed the public: "The line between 'fair use' and infringement is unclear and not easily defined."[2] The most recent treatise on copyright law states that

> "The scope and limits . . . are most obscure, so that the issue of fair use has been called 'the most troublesome in the whole law of copyrighting.'"[3]

A study for the Copyright Office reached "the conclusion that fair use is not a predictable area of copyright law."[4] The distinguished Executive Director of the Copyright Society of the U.S.A. wrote to the Copyright Office that "the term 'fair use' defies definition."[5] A National Science Foundation-sponsored study of photocopying said of fair use: "It is significant that no two legal opinions were in exact agreement."[6]

1. Register of Copyrights, Copyright Law Revision, Report to the Congress on the General Revision of the U.S. Copyright Law, House of Rep., Com. on the Jud., 87th Cong., 1st Sess., House Comm. print, July 1961, p.24.

2. Copyright Office, "Fair Use" of Copyrighted Works, Circular 20, 913, June 1962.

3. NIMMER ON COPYRIGHTS, §145 (1963)

4. Copyright Law Revision, Studies Prepared for the Subcommittee on Patents, Trademarks and Copyrights, Sen. Comm. on Jud., Study 14, "Fair Use of Copyrighted Works" (by Alan Latman), p.14, 86th Cong., 2d Sess., Comm. print.

5. Ibid., p.39. (Walter J. Derengerg)

6. Survey of Copyrighted Material Reproduction Practices in Scientific and Technical Fields, by George Fry & Associates (1962), p. V-20.

EXHIBITS

1. List of Members of the Ad Hoc Committee
2. "Fair Use" -- An Uncertain and Unreliable Guide for Teachers
3. Unsuitability of Copyright Clearing House
4. Proposed New Section on Educational Broadcasting
5. Copyright Duration
6. Copyright and the Constitution

EXHIBIT 1

AD HOC COMMITTEE ON COPYRIGHT LAW REVISION
(Educational Organizations and Institutions)

1. American Association of Colleges for Teacher Education
2. American Association of Junior Colleges
3. American Association of School Administrators
4. American Association of Teachers of Chinese Language and Culture
5. American Association of Teachers of French
6. American Association of Teachers of Spanish and Portuguese
7. American Association of University Women
8. American Council on Education
9. American Educational Theatre Association, Inc.
10. Association for Childhood Education International
11. Association for Higher Education
12. College English Association
13. Council of Chief State School Officers
14. Department of Audiovisual Instruction, NEA
15. Department of Classroom Teachers, NEA
16. Department of Foreign Languages, NEA
17. Department of Rural Education, NEA
18. International Reading Association
19. Midwest Program on Airborne Television Instruction, Inc.
20. Modern Language Association
21. Music Educators National Conference
22. Music Teachers National Association
23. National Art Education Association
24. National Association of Educational Broadcasters
25. National Catholic Educational Association
26. National Catholic Theatre Conference
27. National Catholic Welfare Conference
28. National Commission on Professional Rights and Responsibilities
29. National Council for the Social Studies
30. National Council of Teachers of English
31. National Education Association of the United States
32. National Educational Television and Affiliated Stations
33. National School Boards Association
34. New Jersey Art Education Association
35. Speech Association of America

NOTE: Representatives of the American Library Association regularly attend Ad Hoc Committee meetings although ALA is not formally a member.

Section 5. Duration of Copyright

1. COPYRIGHT LAW REVISION, Studies Prepared for the Subcommittee on Patents, Trademarks and Copyright, Senate Committee on Judiciary, 86th Cong., 2d Sess., Committee print, Study 31, "Renewal of Copyright" (by Barbara A. Ringer), pp. 187, 221.

2. Register's Report (1961), p.51.

3. Ibid., p.51.

4. Senate Hearings (1965) p.68.

5. Register's Report (1961), p.33.

6. Letter of Deputy Attorney General Katzenbach, May 2, 1962, House Report No. 1742, 87th Cong., 2d Session, on H.J.Res.676, p.6.

7. Senate Hearings (1965), p.130.

Section 6. Basic Principles of Public Policy

1. Letter of Deputy Attorney General Katzenbach, May 2, 1962, House Report No. 1742, 87th Cong., 2d Sess., p.6.

2. Hudon, E.G., The Copyright Period: Weighing Personal Against Public Interest, 49 AMERICAN BAR ASSOCIATION JOURNAL, 759 (1963)

3. House Report No.2222, 60th Cong., 2d Sess., p.9.

4. Fortnightly Corp. v. United Artists Television, Inc., U.S. , 20 L.Ed. 2d 1176, 1180 (1968)

5. Op. Cit. supra n.3, at page 7.

6. U.S. v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948).

7. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

6. Meyerhoff, Howard A., President, Committee to Investigate Copyright Problems Affecting Communication in Science and Education, Senate Hearings (1967), p.115.

7. Senate Report No. 640, 90th Cong., 1st Sess., on S.2216, p.4.

8. House Report, p.32.

9. Goldman, Abe A., Copyright Law Revision and Music Librarians, LIBRARY JOURNAL, March 15, 1965, p.1268.

10. Clapp, Verner W., Copying - A Librarian's View, Association of Research Libraries (August 1968), p.6.

Section 4. Reasonable Use of New Educational Technologies

1. Senate Hearings (1967), p.204.

2. Ibid., p.203.

3. Ibid., p.155.

4. Ibid., p.152.

5. Ibid., p.155.

6. House Report, pp.24-5.

7. Senate Hearings (1967), p.191.

8. Ibid., p.194.

9. Ibid., pp.194-5.

10. Ibid., p.95.

11. Ibid., p.558.

12. Ibid., p.561.

13. For rationale see Professor Miller's statement on behalf of the Ad Hoc Committee, Senate Hearings (1967), pp.198-9.

NOTES

Section 1. The Ad Hoc Committee

1. Hearings on S.1006 Before the Subcommittee on Patents, Trademarks and Copyrights, Senate Judiciary Committee, 89th Cong., 1st Sess. (1965) [hereinafter cited as "Senate Hearings (1965)"], "Copyright Law Revision," p.82.

Section 2. What Education Wants from a Copyright Law

1. Wigren, H.E., "An Educator's Viewpoint," SCHOLASTIC TEACHER, Vol. 85, No. 4, Oct. 7, 1964, p.12-T.

2. Wigren, H.E., Hearings on S.597 Before the Subcommittee on Patents, Trademarks and Copyrights, Senate Judiciary Committee, 90th Cong., 1st Sess. 1967, March 16, 1967, p.152. [Hereinafter cited as "Senate Hearings (1967)"].

3. A. Kaminstein, Senate Hearings (1965), p.65

4. Edinger, Dr. Lois V., Hearings on H.R.4347, Before Subcommittee No. 3, House Judiciary Committee, 89th Cong., 1st Sess.,(June 2, 1965), p.385. [Hereinafter called "House Hearings"].

5. Senate Hearings (1965), p.140.

6. CHICAGO TRIBUNE, August 18, 1964, p.24 (editorial).

Section 3. Limited Copying and Recording for Educational Use

1. Senate Hearings (1965), p.172.

2. COPYRIGHT LAW REVISION, Report of the Register of Copyrights, House Committee Print, 87th Cong., 1st Sess. (July 1961), p.27. [Hereinafter cited as "Register's Report (1961)"].

3. Senate Hearings (1965), p.90.

4. House Hearings, p.317.

5. House Report No. 83, 90th Cong., 1st Sess., on H.R. 2512, March 8, 1967. [Hereinafter cited as "House Report"], p.29.

SUMMARY

The Ad Hoc Committee's position on copyright law revision is:

1. Limited Copying and Recording [SECTION 3]
   (a) §107 ("fair use") without textual changes [p.14 et seq.]
   (b) a legislative history that affords some certainty for teachers [p.19 et seq.] and
      (i) assures permanence of "fair use" [pp.16-17]
      (ii) rejects description of 4th criterion such that fair use is obviated by possibility of any sale "no matter how minor the amount of money involved" [pp.21-22]
   (c) rejection of §1(b)(2) of S.2216 [pp.17-19]
   (d) extension of waiver of statutory damages to broadcast teachers and librarians [p.22]

   If these requirements are not all met, Ad Hoc reverts to its original position:
      (1) retention of "not-for-profit" provision [p.10]
      (2) specific statutory authorization for limited educational copying and recording (§111) [p.10]
      (3) statutory "fair use" [p.13]

2. New Educational Technologies [SECTION 4]
   (a) Individualized instruction - eliminate §110(2)(D) of S.597 (and identical §110(2)(C) of H.R.2512) which eliminates individualized learning through modern technology [pp.23-25]
   (b) Educational broadcasting [p.25, et seq.]
      (i) new §110(1A), to differentiate between open and closed circuit transmission of instructional material [pp.26-27]
      (ii) retain House version of §110(2) and §112(b), relative to copying and recording [pp.27-29]
      (iii) new section for licensed uses beyond exemption and "fair use" [p.30]
   (c) Computers [pp.30-35]
      (i) pending Commission study, input for nonprofit educational use is not an infringement [pp.31-34]
      (ii) computer programs should not be copyrightable [p.34]
      (iii) Commission to study technology should be [pp.34-35]
         --independent agency
         --composed predominantly of public members

3. Copyright Duration [SECTION 5]
   The copyright term should comprise an initial period of 28 years plus a renewable period of 28 or 48 years. [pp.35-38]

have all affirmed the primacy of the public interest over the copyright proprietor's interest:

A. The House Report on the present law stated that copyright was enacted

> "not primarily for the benefit of the author, but primarily for the benefit of the public."5/

B. The Supreme Court has said:

> ". . . the copyright law . . . makes a reward to the owner of secondary consideration."6/

C. The Register of Copyrights stated to Congress in his 1961 Report:

> "Within limits the author's interests coincide with those of the public. Where they conflict the public interest must prevail. . . . And the interests of the authors must yield to the public welfare where they conflict." (p.6)

> "The needs of all groups must be taken into account. But these needs must also be weighed in the light of the paramount public interest." (p.xi)

Copyright proprietors are demanding a greater and more inclusive monopoly. It is for the Congress to decide what protection against such monopoly is to be required for the public interest represented by nonprofit education.

The Ad Hoc Committee believes that education is the most universal expression of public interest in the United States. It will be in "the paramount public interest" for the Congress to enact the proposals of the AD HOC COMMITTEE, in order to enable teachers to make reasonable and limited nonprofit use of copyrighted materials for the vital task of educating the school children and youth of America.

Congress, "are forms of monopolies . . ."[1] "Even at its best," wrote the Assistant Librarian of the Supreme Court, "copyright necessarily involves the right to restrict as well as to monopolize the diffusion of knowledge."[2]

Since 1909 Congress has steadfastly exempted nonprofit educational uses from the possibility of restriction on the diffusion of knowledge by such copyright monopoly. The Ad Hoc Committee has urged that, in the public interest, this same kind of Congressional protection for education be written into any new copyright law in order to meet the needs of education for

A. a more effective and more inclusive accomplishment of the long-standing policy of special recognition for education;

B. a clarification of ambiguities so that teachers may readily and easily know what they can legally use in teaching our nation's students; and

C. a logical and reasonable extension of presently available rights under copyright law in order to make effective teaching possible.

II. The Issue is One of Public Policy, Not Property Rights

Some claim that copyright is a fixed property right and that therefore Congress has no authority to enact copyright legislation protecting education. This is simply not so. A long line of Supreme Court and other cases have held that the scope of copyright protection is a privilege, a creature of statute, and wholly a matter of Congressional discretion to grant or withhold. The House Committee's report on the present copyright law said that "Congress has the power to annex to them [copyrights] such conditions as it deems wise and expedient."[3]

This view was again confirmed by the Supreme Court as late as June 17, 1968 in the CATV case.[4]

A fuller analysis of this question appears in Exhibit 6.

III. Primacy of the Public Interest

The Congress, the Supreme Court, and the Register of Copyrigh

the main purpose of those who have advocated a term of 50 years from the death of the author."3/

In his testimony on S.1006, the Register again said in 1965:

"Life-plus-fifty is roughly equivalent, on the average, to a term of 75 years from publication . . ."4/

Comment is appropriate on two unjustifiable claims made by proponents of life-plus-50:

1. Relation to Foreign Law

One of the main justifications advanced for this proposed radical departure from established American copyright practice of copyright renewal and duration is the assertion that it is necessary for American copyright duration to correspond with that of foreign countries. The spuriousness of this argument is described in Exhibit 5.

2. Usefulness of Material in Public Domain

Proponents of life-plus-50 claim that public domain after 28 years is of no real value to education. Here again the Ad Hoc Committee accepts the comments of the Register's Report of 1961:

"Advocates of a uniform single term contend that even though most works have little or no commercial value beyond 28 years, it would do no harm to let their protection continue for the maximum term. They argue that no one is interested in using a work after it has ceased to have commercial value, so the continuation of copyright would be of no practical consequence.

"We believe that this argument is fallacious on two grounds:
--Many works that have ceased to have substantial commercial value in themselves are still useful to scholars, researchers, historians, and educators, as well as to authors of new works based on preexisting ones.
--The argument seems to assume that the public

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derives no benefit from having works in the public domain. Copyright protection for a certain period is essential to foster the creation and dissemination of intellectual works and to give authors their due reward. But on the other hand, there are many circumstances in which copyright restrictions inhibit the dissemination of works or their use in the creation of new works.

"We believe that, when authors or other copyright owners feel that they have no need for a longer term, the termination of copyright restrictions after 28 years is in the public interest."5/

Lastly, as a matter of legal principle and public policy, it is noteworthy that the U.S. Department of Justice has opposed extension of the term beyond 56 years, as an unwarranted monopoly:

"The Department of Justice is opposed to lengthening the period of copyrights. Copyrights (and patents) are forms of monopolies and should not be extended for periods longer than those now provided by law. The present 56-year monopoly granted to authors is in our view fully adequate to reward authors for their contributions to society. Considering this matter from the viewpoint of the public, which is interested in the early passing of copyrighted material into the public domain, it would seem unwise to extend further the copyright monopoly."6/

The Ad Hoc Committee submitted to the Senate suitable language for its proposal on duration of copyright7/, and this position was reaffirmed by the Ad Hoc Committee on October 16, 1968.

SECTION 6 -- Basic Principles of Public Policy

The Ad Hoc Committee believes that there are three basic principles of public policy that should be determinative of copyright legislation:

I. Reasonable Limitation of Monopolies

"Copyrights," the Attorney General of the U.S. wrote to the

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SECTION 6 -- Basic Principles of Public Policy

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I. Reasonable Limitation of Monopolies

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The Ad Hoc Committee believes that the Register of Copyrights was correct in 1961 when he opposed elimination of the renewal requirement:

> "We do not believe that the maximum term of copyright--which we are proposing be 76 years from first public dissemination--is necessary or advisable for all works. Experience indicates that the present initial term of 28 years is sufficient for the great majority of copyrighted works; less than 15 percent of all registered copyrights are being renewed at the present time.
>
> "The percentage of renewals varies from one class of works to another. During a recent year, for example, renewals ranged from 70 percent of the eligible motion pictures, down through 35 percent for music, 11 percent for periodicals, 7 percent for 'books' (which includes text material published in various forms) to less than 1 percent for technical drawings."2/

The Ad Hoc Committee's recommendation -- identical with that of the Register in 1961 -- accomplishes the two objectives of protecting both the author and user of copyright materials, while the life-plus-50 proposal totally ignores and jeopardizes the user's interests. The Ad Hoc Committee's recommendation of 28 years plus 48 years renewal period

1. protects the user, by enabling education to use the 85% of all copyrighted materials which are not renewed, beginning with the 29th year instead of waiting for 100 or so years; and

2. protects the author, by providing the same span of protection, for authors who want it, as contemplated by the life-plus-50 plan.

The Register's Report to Congress in 1961 stated:

> "A term of 76 years from the first public dissemination would be generally equivalent to the term most prevalent in foreign countries . . . Thus, . . . this term would achieve

the field.' The other 6 were to be equally divided between copyright interests and copyright users 'in education, research, and scholarship.'"

This position was reaffirmed by the Ad Hoc Committee on October 16, 1968.

SECTION 5 -- Education's Needs as Affected by Copyright Duration

As previously indicated, education's most pressing need in the copyright law is assurance of reasonable access to copyrighted materials within basic principles. An overriding element in this connection is the term or duration of copyright.

Since one of its earliest meetings, held in Washington, the Ad Hoc Committee has consistently opposed copyright law revision proposals which would radically change the present duration of copyright by adopting a base period measured by the life of the author plus fifty years. The public interest is damaged by efforts to extend the period before which copyrighted works go into the public domain. The Ad Hoc Committee recommends retention of the present law's provision, a 28-year initial period plus a 28-year renewal period. As an alternative, it favors the Register's own proposal in his 1961 Report to the Congress: a 76-year total term, comprised of an initial 28-year term plus a 48-year renewal term.

Since the first American copyright law in 1790, a renewable term has been the characteristic hallmark of our copyright law. The original U.S. copyright law allowed only a 14-year period plus a 14-year renewal. The present law provides for an initial period of 28 years copyright, renewable for a similar period of 28 years after which the work goes into the public domain. The copyright owner's non-renewal puts the work in the public domain after 28 years, and thus education may use such material for its purpose.

The Ad Hoc Committee is principally concerned, in connection with duration, that the renewal requirement be retained because of its effect on the passing of copyrighted material into the public domain. An official Copyright Office study shows that only 15% of all registered copyrights are being renewed at the present time.[1/] Therefore, the proposed duration for life-plus-50 would deprive education, in some instances for 100 years, of the present right to use 85% of all registered copyrights after 28 years.

"Educational institutions buy books; they put them on their library shelves. An English professor goes to the library, pulls Tennessee Williams off the shelf and reads it. That is not an infringement. He may sit there and count the number of times Tennessee Williams uses certain antisocial words. That is not a copyright infringement. He may have research assistants analyze and manipulate the paragraphs, looking for sentence structure and systactical identities within the work. That is not a copyright infringement. Yet under Senate bill 597, if our English professor wants to input the same novel into a data storage and retrieval system to perform the same noninfringing functions, he is infringing because according to the bill, input --looking at the menu--is an infringement."11/

The impact of these provisions in making input an infringement is seriously to restrict the development of educational computer technology. Such requirement would prejudice development of the technology and inhibit experiment designed to ascertain the capacity of these new data processing devices.

Failure to adopt the Ad Hoc Committee's position of a moratorium relative to input during the study period would render a fair test of the situation impossible and therefore would cripple the Commission's study. Unless input were not a copyright infringement during the study, neither education nor copyright owners would have the opportunity to experiment with the effect of educational uses of copyrighted works in computers. Educational users would be forced to make advance, unnecessary, and premature decisions as to whether they would ever use (or output) the input materials. The whole purpose of the Commission's study as well as of the technology would be thwarted by compulsion to decide output before input. As professor Miller put it, "this bill, in a host of ways, is too prejudiced against the storage and retrieval system to permit balanced experimentation."12/

The Ad Hoc Committee's most recent statement on input was included in its resolution of March 13, 1968 as follows:

"For the period terminating one year after submission of the final report of the Commission on New Technological Uses of Copyrighted Works, reproduction of copyrighted works of authorship

for input in automatic systems capable of storing, processing, retrieving, and transferring information shall not be an infringement of copyright. Thereafter, unless Congress provides otherwise, the legal status of such reproduction shall be determined under the 1909 law."

This position was reaffirmed by the Ad Hoc Committee on October 16, 1968.

B. Computer programs

A computer program consists of the instructions to a computer as distinguished from the data stored in, and retrieved from, the computer.

Section 102 appears to extend copyrightability to such computer programs as such. The Ad Hoc Committee opposes such provision as unwise and improper.13/

C. National Commission*

S. 2216 would establish a National Commission on New Technological Uses of Copyrighted Works. The Ad Hoc Committee is concerned about the Commission's composition, and believes that there should be a broader public representation. As now envisaged, the Commission consists of two contending sides with a third group acting as arbitrators. The Ad Hoc Committee believes that public representation (not the "interest groups," so called) should predominate in the Commission. In this connection, the Ad Hoc Committee adopted a resolution on July 10, 1967 which contained the following relevant positions:

(1) "That such a Commission be independent, not within the Library of Congress or within any agency of the Government."

(2) "That such a Commission be composed of 15 members, with the President to appoint 9 of them 'representing the public interest generally and with some knowledge of

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* See p. 17 et seq. for impact of S.2216 upon photocopying and "fair use."

84.

Another Ad Hoc Committee witness, Professor Arthur R. Miller, University of Michigan Law School, stated that §110(2)(D) of S.597

> "imperils the ability of education to use computers and computer-associated instruction at all levels of education and destroys a long standing practice of legislative relief for the teaching profession from certain copyright restrictions. . .. this is not a neutral bill and section 110(2)(D) demonstrates that."[8]

As to input, Professor Miller testified:

> ". . . it is clear that the revision bill makes it a copyright infringement to input copyrighted materials into a storage and retrieval system without regard to the possibility that the copyrighted materials may never be used in a way that will have any economic toll on the copyright proprietor."[9]

Senate Hiram L. Fong, in a colloquy during the hearings, said that charging for input is like a restaurant imposing a cover charge for looking at the menu, without regard to whether any food was ever ordered.[10] In a later appearance as a witness, under a different aegis, Professor Arthur R. Miller, said to Senator Fong:

> ". . . if we are to use modern information transfer technology in an efficient and socially rewarding way, education must be able to look at the menu. Educators and scholars have to be permitted to input materials into the system. They have to be able to look at certain material in computer readable form to see if they want to use it, if they want to bring it out in the form of output or do anything else to it that looks like a traditional copyright infringement. . . . But a user may not know whether the copyright material is useful to him until he can get it into the machine and examine it in ways that would be wholly noninfringement under traditional copyright doctrines.

A. Input and Infringement

The computer is a new communications medium. It is a technology about which we know relatively little at this point. Despite this, the pending bills would force legislative decisions on the interrelationship between computer technology and copyright policy before there has been any thorough study of the implications of such interrelationship.

In order that there might be an adequate factual and policy consideration of this interrelationship, the Ad Hoc Committee proposed at the "summit conferences" that a commission be created to study and report. (The Commission under S.2216 will be described below.) There was general agreement with the idea, but a major point of difference was to be the interim status of input into computers.

The Ad Hoc Committee's position is that at least for the interim period while a study was being made,

1. mere input into a computer for nonprofit educational purposes should not be infringement, and

2. questions of permissibility of use, "fair use" and royalties should arise only at the output stage.

The rationale for this so-called "moratorium" for the interim study period was stated by Dr. Fred Siebert, Dean of the College of Communications Arts, Michigan State University, and copyright consultant to the American Council on Education, who served as chairman of a subcommittee of the Ad Hoc Committee which adopted the subcommittee's recommendations. Dean Siebert testified on computers at the Senate Hearings under the Ad Hoc Committee's umbrella:

> "We contend that this language of the House report, together with section 106, extends copyright protection to computer transmission uses, and tends to freeze the law in favor of the copyright proprietor and to the detriment of the copyright consumer during this transition period of development and experimentation. We submit that the restrictions imposed by this bill and the accompanying House report will seriously hamper instructional uses of the newer devices as well as scholarly and scientific research and experimentation, and consequently harm the public interest."[7]

The Ad Hoc Committee rejects any special restriction on "fair use" for broadcast teachers as unfair, unjust and unreasonable.

E. Licensed Uses

The Ad Hoc Committee believes that there are two levels of use of copyrighted materials by educational broadcasters:

1. those permissible by reason of the limited exemptions which the copyright law should provide, and through statutory "fair use"; and

2. those for which reasonable fees should be paid.

In this latter connection the Ad Hoc Committee proposed to the Senate Subcommittee that where such exemptions or "fair use" are inapplicable, the copyright statute should provide for licensed use of copyrighted materials for nonprofit educational transmissions, at reasonable fees. It is absolutely essential to note that this statutory licensing proposal is not intended in any way to impinge upon either the statutory exemptions or on "fair use," but rather merely to supplement those provisions as applicable to educational broadcasting.

As a means of consolidating into one section all the provisions specifically applicable to educational broadcasting, the Ad Hoc Committee proposed to the Senate Committee a new section to be substituted for Sections 110(2) and 112(b).[2/] This proposal is set forth in Exhibit 4.

III. Educational Use of Computers

Computers (using the term in its broad range) are the fastest growing technological developments in American education today. Nevertheless, the question of their impact on the copyright law was not really discussed or debated in any substantial manner before H.R.2512 was passed by the House. The pending bills do not mention "computers," as such, but they do cover computer use in §110(2)(D) of S.597 [and the identical §110(2)(C) of H.R.2512]. Implicitly, the matter is also covered in §§101, 102, and 106. The language of the bills, plus the statements in the House Report, create serious problems for educational computer use of copyrighted materials.

the new age groups coming into school. A one-year privilege allows only one re-use of a school lesson, providing that the calendar hasn't added an additional day to the year in the meantime.

More than one-third of all ETV lessons today are repeat broadcasts of lessons more than one year old. And roughly 80% of all lessons proposed for broadcast today are prepared with the expected life well in excess of one year. To require the destruction of a broadcast lesson after one year, and the remaking of the identical lesson on a new tape next year, is a gross waste of time and talents. For such lessons ETV requires a life as long as the program has utility.

The Ad Hoc Committee recommends and urges the provision of §112(b) as passed by the House in H.R.2512 as follows:

> "(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make copies or phonorecords of a particular transmission program embodying the performance or display."

D. "Fair Use"*

A most unsatisfactory situation arises out of the statement in the House Report (p.36) which discriminatorily restricts "fair use" for educational broadcasts and seems to suggest a separate and more limited "fair use" for educational broadcast teachers than is available to other teachers. The House Report language could very well negate entirely the application of "fair use" to educational radio and television teachers.

As the Ad Hoc Committee testified before the Senate Subcommittee:

> ". . . the 'fair use' needs of teaching are the same whether over the air or in the classroom"[4]

---

* Section 3 of this paper discusses "fair use" under §107 which is identical in language in both H.R.2512 and S 597.

transmission by a governmental body or other nonprofit organization, if:

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the transmission is made primarily for:

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as part of their official duties or employment . . ."

C. Recordings -- number and period of use

S.597 permits only two recordings of a program and -- except for one copy for purely archival purposes -- requires destruction of the copy within one year after its first broadcast, §112(b). This provision was eliminated in the House-passed H.R.2512 which authorized copies or phonorecords of a particular program without such harmful limitations to education.

(1) Number of Recordings

S.597 would allow two copies, only one of which may be used for actual broadcast and for exchange with other stations. Having only one copy of the Thanksgiving history lesson to send to other areas means that at best it could be mailed (the most common shipping method) to only one or two other areas, or they would have their Thanksgiving program some time after Christmas.

In order that ETV may be effective, multiple copies are required. The exchange practice of ETV stations require multiple copies for reasonable contemporaneous broadcast. The station broadcasting such an exchanged program would, if it produced the program itself, have the right to use the copyrighted materials without clearance and royalties.

(2) Period of use of recordings.

School curricula are composed of lessons repeated annually to

Copyright Law Revision that 110(1A) refer to controlled or closed transmissions and that 110(2) refer to uncontrolled or open transmissions.]"3/

B. The 100-mile Limitation

§110(2)(B) of S.597 allows educational broadcasts of copyrighted material only if

> "the radius of the area normally encompassed by the transmission is no more than 100 miles."

This provision was deleted from H.R.2512 as passed by the House.

The Senate bill's provision has particularly heavy and harmful impact on ETV, since practically half of all ETV stations share some programs on a simultaneous basis with at least one other ETV station. Such arrangements will continue to grow. If the 100-mile limitation is enacted, it will drastically impair ETV's effectiveness.

State-wide instructional broadcasting is an important teaching tool in the effort of States to provide high quality instruction to all their people. Such state-wide systems now exist in 13 states or jurisdictions (Alabama, California, Connecticut, Georgia, Hawaii, Maine, Minnesota, Nebraska, North Carolina, Oklahoma, Oregon and South Carolina, as well as in Puerto Rico). They are also under construction in six others: Kentucky, Mississippi, New Hampshire, New York, South Dakota and Vermont. The 100-mile provision would cancel out any such instructional broadcasting in these states.

The Ad Hoc Committee recommends and urges the provision of §110(2)(A) and (B) as passed by the House in H.R.2512 [but not (C)] as follows:

> "§110. Limitations on exclusive rights: Exemption of certain performances and displays
>
> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
>
> (1) . . .
>
> (2) performance of a nondramatic literary or musical work, or display of a work, by or in the course of a

78.

A. The difference between closed circuit and open channel broadcasting

S.597 and the House Report on the similar provisions of H.R.2512 (see p.41, 2nd full paragraph) fail to distinguish between closed circuit or point-to-point instructional broadcasting, on the one hand, and open channel broadcasting, on the other. This failure is based upon an error of fact. Closed circuit transmissions and ITFS consist of limited, controlled systems within the schools; they are controlled or closed transmissions not available to the public and are only extensions of the classroom. It is unrealistic and unreasonable to treat them just like open channel broadcasts which can be picked up by anyone who tunes in. As Dr. Anna L. Hyer, Executive Secretary, Department of Audio-visual Education, NEA, testified before the Senate Subcommittee:

> "We feel then, that closed-circuit television should be accorded equal status with face-to-face teaching, because in modern technology they are almost the same."2/

Consequently, the Ad Hoc Committee believes that closed circuit or controlled transmission should not be subject to §110(2) which deals with open channel broadcasting, but should be subject to a new proposed §110(1A). The text of this proposal, as submitted to the Senate Subcommittee, is as follows:

"Section 110. Limitations on exclusive rights: Exemption of certain performances and displays.

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) . . .

(1A) performance or display of a work by instructors or pupils by or in the course of a closed transmission by a governmental body or other nonprofit organization if such performance or display is in the course of the teaching activities of a nonprofit educational institution.

(2) . . .

[NOTE: Underlined matter is proposed new language]

[NOTE; It is the intent of the Ad Hoc Committee on

Education is increasingly moving in the direction of individualized learning. It is becoming less and less teacher-oriented and more and more student-oriented. Section 110(2)(D), S.597, is a body-blow to all this. The Ad Hoc Committee has indicated that it will not accept any copyright revision bill which includes §110(2)(D) as it appears in S.597.

II. Educational Broadcasting

The Ad Hoc Committee originally proposed retention of the "not-for-profit" concept in the revised copyright law. That principle is now, and would be, applicable not only to instructional use of copyrighted material, but also to general, cultural and community programs on educational broadcasts.

As part of its general compromise, the Ad Hoc Committee now seeks a specialized and limited exemption only for instructional broadcasting uses of copyrighted material.

Educational radio and ETV stations must operate wholly noncommercially. They are licensed by the FCC only to nonprofit educational organizations such as public school systems, universities, State Departments of Education and nonprofit community educational corporations. These stations are small, with few employees and very limited budgets.

Especially with ETV, excellence and diversity of programming will depend upon interconnections of stations by means of actual electronic interconnections or by recordings. ETV stations, in particular, use copyrighted materials such as photographs, maps and charts, literary material and music. Under the present law's "not-for-profit" provisions, such copyrighted materials may be used in local educational broadcasts without clearance or royalties.

The two current bills have differing provisions applicable to educational broadcasting, although both started out identical. H.R.2512 was amended on the floor of the House so that §110(2) and §112(b) substantially differ from the comparable provisions of S.597. The Ad Hoc Committee recommends adoption of the House version, with additional provisions.

The Ad Hoc Committee's recommendations in this area relate to the following matters:

for a limited statutory exemption, as proposed by its §111, for a "fair use" provision interpreted by the language "no matter how minor the amount involved."

For the Ad Hoc Committee, all five elements, jointly, are essential and indispensable to its acceptance and the continued viability of the compromise agreement. If any are missing, the Ad Hoc Committee is no longer bound by any such compromise, and it will revert either to its original position or to another position suited to protecting education's interest under the copyright law. This position was reaffirmed by the Ad Hoc Committee on October 16, 1968.

III. Waiver of Statutory Damages

Under present law, any infringement--no matter how innocent, no matter how harmless--subjects the infringer to minimum mandatory statutory damages of $250 for each infringement.

The Ad Hoc Committee has consistently urged that the copyright law grant discretionary authority to the courts to waive all statutory damages for innocent infringement in a nonprofit educational situation. In the current revision bills, Section 504(c)(2) provides such discretion only to

> ". . . instructors in a nonprofit educational institution . . . in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction . . ."

The Ad Hoc Committee has some qualms whether the definition of innocent infringement is so rigid as to be self-defeating. In addition, the Ad Hoc Committee urgently proposes that the waiver be extended to educational broadcast teachers and to librarians. The rationale for including such groups is identical with one of the basic purposes of the Ad Hoc Committee's proposal for §111 and its later acceptance of the "fair use" compromise. That purpose, as recognized by the House Report is, "the need for greater certainty and protection for teachers" (p.31). Educational broadcast teachers and librarians need and merit this same "greater certainty and protection."

or phonorecords or by any other means specified . . ." because

> ". . . of the lack of any judicial precedent establishing that the making of copies by a teacher for classroom purposes can, under appropriate circumstances, constitute a fair use . . ." (p.33)

Therefore, statements in the Committee's report on copying are of particular significance. And there is one such statement which negates the compromise agreement, so far as the Ad Hoc Committee is concerned. As indicated, one of the required elements in the compromise was that Section 107 should set forth four of the criteria which may be used for determining "fair use." Ad Hoc's agreement to the compromise is correctly stated in the House Committee Report's comments that the fourth criterion "must always be judged in conjunction with the other three criteria," (p.35) and that the four criteria "must be applied in combination with the circumstances pertaining to the other criteria." (p.32) However, these statements--which are the essence of the compromise agreement--are wholly vitiated by another statement in the House Report dealing with the fourth criterion [e.g., "the effect of the use on the potential market for or value of the work"], as follows:

> "Where the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection." (p.35) [emphasis added]

The language "no matter how minor the amount of money involved" has been aptly called "a sort of De Minimis rule in reverse."[10/] It flies in the face of the combined consideration of all four criteria and prevents dealing with all four criteria in conjunction with each other. It seems to be a categorical assertion which, in effect, wipes out the other three criteria. At the very least, it creates such uncertainty as to vitiate the meaningfulness of the entire section and to prevent it from operating as it was intended, to authorize limited copying and recording for educational purposes.

The House Report's restrictive language on the fourth criterion in §107 is all the more important because the Report states that this fourth criterion is "often the most important of the criteria of fair use." (p.35)

The Ad Hoc Committee never accepted--and does not now accept--any compromise agreement whereby it foregoes its original proposal

The Ad Hoc Committee receded from its original two-pronged approach and its proposed §111 and accepted a compromise involving a rewritten "fair use" provision and a clear legislative history only upon the basis of the iron-bound Congressional assurance that

> "the doctrine of fair use, as properly applied, is broad enough to permit reasonable educational use."[8/]

The objective of infusing some reasonable degree of certainty into "fair use" was a sine qua non for Ad Hoc, was accepted at the "summit conferences", and was adopted by the House Committee, as indicated above (p.37). This certainty was to derive not only from the language of the bill, but also from the Congressional Committee's report. As the House Committee's Report put it,

> "It is therefore important that some ground rules be provided for the application of fair use in particular situations." (p.33)

Thus, it set forth its "intention . . . with respect to the application of the fair use doctrine in various situations" (p.31), as a means of providing some degree of reasonable certainty so that teachers may continue superior teaching practices without fear of infringement or liability.

All of this need for certainty was especially true in the field of copying and recording copyrighted works. According to the Copyright Office's General Counsel, no court under existing law had "ruled specifically on cases involving the reproduction of copies for purposes of research or teaching."[9/] The House hearings are replete with disagreements among copyright law experts as to just how far, if at all, fair use allows copying, either in single or multiple copies. The House Committee's Report itself recognized the need to provide teachers with some degree of certainty on copying, particularly in terms of the four statutory criteria:

> ". . . some explanation of the considerations behind the language used in the list of four criteria is advisable. This is particularly true as to cases of copying by teachers, since in this area there are few if any judicial guidelines." (p.32)

The Report specifically recognized the need to explain the language in §107 that "fair use" included "such use by reproduction in copies

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The Supreme Court has also held that the conditions upon which copyright is granted are wholly within the constitutional power of Congress to prescribe.[8] The whole history of the copyright law exemplifies the fact that an author has no constitutional property right in or to copyright protection and that such right as an author obtains is a privilege to be granted or withheld by Congress in its discretion. As the House Report on the present copyright law said of copyright rights granted to authors: ". . . Congress has the power to annex to them such conditions as it deems wise and expedient."[9] The very first copyright law, enacted in 1790, 1 STAT. p.124, c 15, gave protection only to maps, charts and books, and that only for a 14-year period plus renewal of 14 years. It did not cover periodicals, drawings, works of art, musical composition, dramatic composition--to name but a few. And even the present far more extensive law of 1909 is not all-inclusive and places limits on author's copyright privileges. Congress has limited the number of years during which an author may exercise copyright privileges. Congress has limited the uses to which the copyright owner's copyright privileges attach, i.e., the "for profit" limitation on public performance rights; compulsory licenses; the non-inclusion of "rental rights," to cite but a few. In addition to Congressional limitations of any so-called "property" rights in copyright, the courts have also developed a further limitation through the doctrine of "fair use."

The Register himself has officially rejected this so-called "property" concept of copyright:

> "Copyright . . . has certain features of property rights, personal rights and monopoly, but it differs from each of these. The legal principles usually applicable to property are not always appropriate for copyright."[10]

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8. Wheaton v. Peters, 8 Pet., 591, 663-4 (1834). See also Application of Cooper, 254 F.2d 611, 616 (C.C.P.A. 1958), cert denied 358 U.S. 840 (1958); Stuff v. La Budde Feed & Grain Co., 42 F. Supp. 493, 496 (E.D. Wis. 1941); See NIMMER ON COPYRIGHTS (1963), p.14.

9. Op. cit., supra n.2, p.9.

10. Register's Report (1961), p.6.

Thus, it is clear that copyright is a privilege conferred by statute and that the conditions, limitations and exemptions upon which such privilege is conferred are wholly within the constitutional power of the Congress to prescribe. Therefore, the provisions of a copyright act depend not upon property rights, but upon public policy.

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LEGAL AND ILLEGAL COPYRIGHT PRACTICES

The following are excerpts from recent articles which have been prepared to define certain practices which are legal or are illegal under the pending copyright law. The initial section is excerpted from an article from the April 1969 issue of Today's Education and is written by Doris Timpano, Educational Communications Consultant, Richard S. Grossley Intermediate School, Jamaica, New York.

1. AN AUDIO-VISUAL SUPERVISOR SEES A GOOD PICTURE IN A MAGAZINE WHICH IS COPYRIGHTED. HE WISHES TO MAKE A TRANSPARENCY OF THIS PICTURE AND PRE-PRESENT IT TO THE TEACHER TO ENCOURAGE HIM TO USE THIS MATERIAL, AS WELL AS OTHER MATERIALS, IN HIS TEACHING FOR THE IMPROVEMENT OF INSTRUCTION.

   This type of activity is prohibited, according to HR 2512, Fair Use Doctrine. In the case of classroom copying, it is limited to ". . . a teacher who, acting individually and at his own volition, makes one or more copies for temporary use by himself or his pupils in the classroom."[1]

2. A TEACHER PREPARES A TRANSPARENCY OF A CHART FROM A COPYRIGHTED BOOK, ON HIS OWN VOLITION. AT THE END OF HIS LESSON, HE FILES THIS TRANSPARENCY CHART AMONG HIS OWN LESSON PLANS FOR FUTURE REFERENCE AND USE, NEXT WEEK, NEXT MONTH OR NEXT YEAR.

   Again, this type of activity might become an infringement and illegal because, ". . . the use could turn into an infringement if the copies were accumulated over a period of time with other parts of the same work . . ."[2] or because the ". . . copying displaces what realistically might have been a sale, no matter how minor the amount of money involved. . . "[3]

3. A TEACHER PREPARES A SERIES OF PICTURES COPIED FROM SEVERAL COPYRIGHTED TEXTS. AFTER USING THIS MATERIAL IN HIS CLASSES, HE FILES IT AWAY FOR FUTURE REFERENCE AND USE.

   Again, this teacher is violating the proposed new copyright law. The Congressional Report on the bill states that copying "would turn into an infringement if the copies . . . were collected with other material from various works so as to constitute an anthology."[4]

4. A SCIENCE TEACHER PREPARES MULTIPLE COPIES OF A HEART DIAGRAM OBTAINED FROM A COPYRIGHTED SOURCE. HE DISTRIBUTES COPIES OF THIS DIAGRAM TO EACH STUDENT DURING HIS HEART LESSON AND ASKS HIS STUDENTS TO RETAIN THIS DIAGRAM IN THEIR NOTEBOOKS AND STUDY IT FOR FUTURE REFERENCE.

Right again, maybe illegal! According to the doctrine of Fair Use, multiple copies should be limited to the size of a class, and a court may decide fair use requires that all such copies be recalled or destroyed after temporary use.[5]

5. A HIGH SCHOOL ENGLISH CHAIRMAN SEES AN ILLUSTRATION IN A COPYRIGHTED BOOK WHICH EFFECTIVELY POINTS OUT AN IMPORTANT CONCEPT IN POETRY. HE DECIDES TO CUT OUT THIS PICTURE AND ASKS HIS AUDIO-VISUAL DIRECTOR FOR ASSISTANCE IN MAKING 500 COPIES FOR DISTRIBUTION TO ALL ENGLISH CLASSES.

   He did it again, illegal! Assuming that the illustration was not separately copyrighted, multiple copies should not only be limited to the size of a class, BUT circulation should also be limited to the single classroom.[6]

6. A DRAMA TEACHER IS PUTTING ON A COPYRIGHTED PLAY. HE HAS ONE COPY OF THIS TWELVE PAGE PLAY AND REQUESTS THAT THE AUDIO-VISUAL CONSULTANT PREPARE TEN COPIES TO ENABLE EACH PLAYER TO HAVE A COPY OF THE SCRIPT.

   Highly illegal! Again, according to the doctrine of fair use, "Where the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection."[7]

7. A SCHOOL SYSTEM, EQUIPPED WITH CLOSED-CIRCUIT TELEVISION FACILITIES, TRANSMITS A FILM WHICH THEY OWN, INTO AN INDIVIDUAL CLASSROOM VIA CLOSED-CIRCUIT TELEVISION, UPON THE REQUEST OF THE CLASSROOM TEACHER.

   Illegal! Since face-to-face teaching activities have been interpreted by the House Report to". . . exclude broadcasting or other transmissions into a classroom whether radio or television and whether open or closed circuit."[8] Film producers argue that the contract under which the film was purchased by the school district prescribes the use which can be made of that film within the school program. In most cases, the contract would forbid such use.

8. A STUDENT WISHES TO SEE OR HEAR A VIDEO OR AUDIO-TAPE, FILM, FILMSTRIP, SLIDE OR TRANSPARENCY FOR PURPOSES OF INDEPENDENT STUDY IN A LIBRARY CARREL. IN DOING SO, HE INDIVIDUALLY RETRIEVES THE INFORMATION ELECTRONICALLY FROM A GENERAL SOURCE (E.G., VIDEO BANK IN THE SCHOOL'S LEARNING RESOURCES CENTER).

   Illegal! Under Section 110(2) (C) of H. R. 2512, if the student (and not the teacher) activates the retrieval, such use becomes copyright infringement.

9. A SCIENCE TEACHER ON CLOSED-CIRCUIT TELEVISION IS DEMONSTRATING A FROG DISSECTION. HE USES A FRESHLY KILLED FROG AND A COMMERCIAL PLASTIC MODEL OF THE INTERNAL ORGANS OF THE FROG.

   The showing of the commercial model of the frog which is copyrighted is illegal! At this writing, the dead frog does not have a copyright and can be exhibited both live and via closed-circuit educational television!

10. A TEACHER WISHES EVERY MEMBER OF HER CLASS TO PERFORM AN EXERCISE WHICH IS CONTAINED IN A WORKBOOK FOR WHICH SHE HAS ONLY ONE COPY. SHE DUPLICATES THE WORKBOOK EXERCISE FOR THE 30 PUPILS IN HER CLASS.

> Under the new law, this practice would be considered illegal because the workbook is a consummable work; that is, once it is used, it cannot be reused. Answer sheets to standardized examinations are also considered consummable works and cannot be duplicated.

Are you beginning to be concerned about the legality of your own educational practices? Are you guilty of any of these infractions of the proposed copyright law? If so, you can take heart in the fact that the new legislation includes discretion to a court to waive statutory damages for classroom teachers who innocently infringe. However, if you have read to this point, some may argue that you can hardly classify yourself as "innocent" under the law.

Now that you have seen examples of illegal educational practices as interpreted under pending copyright legislation, you would probably like to know just which copying activities are considered legal under pending legislation.

1. Legal to make copies of extracts or portion of a copyrighted work, picture, or chart, which are not self-contained and which are relatively "not substantial in relation to the larger self-contained work" from which they are taken IF you limit the number of copies to one-class size, do not circulate them beyond the classroom and remove the same copies from circulation immediately after temporary use.

2. Legal to make a <u>single</u> transparency of a copyrighted picture, chart, etc., from a collective work (for example, an encyclopedia volume or a whole periodical issue) IF you do not retain this transparency on a permanent basis.

3. Legal for pupils to use copies of an extract as an exercise in shorthand or typing or for foreign language study.

4. Legal to make and use recordings of performances by music students for purposes of analysis and criticism.

5. Legal to make one or more copies without permission of a newspaper article for class distribution and study.

6. Legal to make <u>one</u> copy of a single poem, story or article in a collective work BUT not of the entire collective work

(for example, an encyclopedia volume, a whole periodical issue).

7. Legal to make multiple copies of a very short self-contained work such as a four line poem, a map in a newspaper, or a one-half page vocabulary builder from a monthly magazine unless it is a complete poem or map which is separately copyrighted!

8. Legal to make a recording (audio or video) of a radio or TV program off the air for later use in the classroom.

AND NOT MUCH ELSE!

FOOTNOTES

1. House Report No. 83, 90th Congress, First Session, on H.R. 2512, Copyright Law Revision, March 8th, 1967, p. 33.
2. Ibid., p. 34.
3. Ibid., p. 35.
4. Ibid., p. 34.
5. Ibid., p. 33.
6. Ibid., p. 33.
7. Ibid., p. 35.
8. Ibid., p. 41.

The following is an excerpt from the article by Fred S. Siebert of Michigan State University. The article is titled Proposed Copyright Law Will Affect Education and has been included in the Summer 1968 ERIC at Stanford Newsletter. The excerpts begin with the comment:

The following is an attempt to answer some of the more common problems which will arise under the proposed legislation and which will affect the practices of teachers:

1. Can a school videotape an instructional television program off the air and put it in its library for showing in later years?

Answer: (1) Under present law: Yes, if the later showing is either on a non-profit broadcasting station or within a school system. If the program is copyrighted or if it contains copyrighted material, it cannot be shown on a commercial station without clearance.

(2) Under proposed law: If the program is <u>not</u> copyrighted, a school can make any use it wishes-but if the program is copyrighted or contains copyrighted material (outside fair use), the school may make a recording but may not use it except for a part of a regular instructional program. In other words, it may not use the program for general educational or "enrichment" purposes.

2. Can a school videotape a commercial program off the air and use it later for class instruction?

Answer: (1) Under present law, Yes, if the program is non-dramatic.

(2) Under proposed law: Two copies may be made if the program is non-dramatic, one for archival purposes and the other only for use as a "regular part of the systematic instructional activities of a governmental body or non-profit educational institution" and if reception is made primarily for "classrooms or similar places normally devoted to instruction."

3. Can a school library photocopy one page out of a copyrighted book at the request of a student who wants to use this method of "taking notes?" Can it copy 50 pages from the book for the student?

Answer: Under both present and proposed law, the school library may photocopy one page out of a copyrighted book. This comes under "fair use."

To copy 50 pages would be an infringement under both present and proposed law since it would go beyond the bounds of "fair use." Where the line should be drawn between say five and 50 pages is uncertain.

4. Can an instructor make 30 photocopies of a chapter from a copyrighted book for the use of the 30 students in his class?

Answer: No. Again, the instructor is going beyond "fair use" under both present and proposed law. The copying of an entire chapter would tend to interfere with the potential sales of the copyrighted book.

5. Can a school library make abstracts of copyrighted books or articles and store them in a computer for retrieval and use by scholars?

Answer: Under present law, abstracts which are paraphrases and which do not copy the literary form of the book may be made and stored in a computer for later use.

However, under the proposed law it is questionable whether such use is legal. The special commission mentioned above would be authorized to study this problem.

6. Can a university put a chapter from a copyrighted book into a computer in order to make a content analysis of it?

Answer: Under present law, Yes, although attorneys for publishers contend that it is an infringement.

Under proposed law: No - unless the commission at some future date recommends a change which is accepted by Congress.

7. Can a teacher make slides of charts and pages from a copyrighted book in order to use them in a lecture?

Answer: Under present law, Yes, if the use is not-for-profit.

Under proposed law, the teacher may make slides of charts and pages of a book if the subsequent use is a part of a "systematic instructional program," designed for reception in a "classroom." Otherwise, the chart may not be used. However, the page from the book would come under "fair use."

8. A scholar received a pre-publication copy of a manuscript which is to be published in a copyrighted journal. Can he duplicate the manuscript for use by his class?

Answer: Under present law, No. This is governed by common-law pre-publication copyright.

The answer would be the same under the proposed law.

9. Can a teacher tape a musical program off the air for use in his classes?

Answer: Under present law, Yes. This is a not-for-profit use.

Under proposed law, he could tape the program and use it only if the use was a part of a program of "systematic instruction" in a classroom. He could not use the tape for a program in the school auditorium.

10. Can an individual borrow a record disc from a friend and tape it so that he can play the music on his own tape recorder?

Answer: Under the present law, Yes.

Under proposed law, No, if the music is copyrighted. The proposed bills for the first time recognize property rights in a recording and give the recording company the right to prohibit any device which "directly or indirectly recaptures the actual sound fixed in the recording."

11. Can a teacher borrow a record of copyrighted music from the school library for performance before his class? Can the record be played before the student body in the school auditorium?

Answer: Under present law, Yes to both questions.

Under the proposed law, the teacher could use the record in his class since this is part of a "systematic program of instruction." However, the record, even though the property of the school system, could not be played in the school auditorium since it would not be a part of a class instruction and would under the terms of the bill be a "public performance" which requires clearance from the owner of the copyright on the music (not the owner of the copyright on the record).

12. What cases or legal precedents have been established to guide a school in determining its policy on these matters?

Answer: No legal cases, and very little precedent. No uniform pattern of permissions or clearances has been set up either in the textbook or music publishing field. Some publishers answer such requests promptly and give permission; other fail to answer or request a fee which is beyond the means of the local school system.

However, publishers of dramatic works seem to have devised a workable system of clearances for performances. Most newspapers and magazines, even though copyrighted, do not object to the use of their contents for educational purposes.

The most troublesome question for the teacher is the extent of the "Fair Use" exemption. As pointed out in the answer to Question 3, to copy one page of a book would come under fair use; to copy 50 pages would not. Would 5 or 10 pages come under the exemption?

The proposed bill contains the following language on this problem: "Sec. 107 ..... In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

(1) the purpose and character of the use;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work."

Which is not too much help to the teacher.

Copyright Legislation and You

DORIS M. TIMPANO,
educational communications consultant, Richard S. Grossley Intermediate School, Jamaica, New York.

• As a teacher, you have frequently copied educational materials for use in your classroom to enrich your teaching. As an administrator, you have frequently sanctioned, authorized, and even encouraged the use of modern copying devices by your staff to enhance educational practices. Have you ever wondered about the legality of your actions? Have you ever stopped to consider where the line is drawn between a legal and an illegal copying act on your part in your school for the benefit of your students and faculty?

The educational situations printed here are realistic ones of the type I face daily as an educational communications media consultant in an intermediate school in New York City. All ten of them involve practices that would be considered infringements if the bill (S.543) introduced in the Senate in January is passed into law by the 91st Congress. S.543 combines into one piece of legislation the old copyright revision bill, which expired when the 90th Congress adjourned last fall, and the bill to create a National Commission on New Technological Uses of Copyrighted Works.

Whether these same practices would be considered legal under present copyright law is a point of considerable debate. According to the Register of Copyrights, "The line between fair use and infringment in present law is unclear and not easily defined. The scope and limits are most obscure, so that the issue of fair use has been called 'the most troublesome in the whole law of copyrighting.'" The Register further advises that the safest course to follow, if there is any doubt or question, is to consult an attorney. The problem is that the attorneys are not in agreement either! Under present law, there is no rule of thumb that can be followed by which a teacher can know how much of a copyrighted work may safely be used (as fair use); each instance must be decided by the courts on its own specific merits.

1. *An audiovisual supervisor sees a good picture in a magazine that is copyrighted. He makes a transparency of this picture and gives it to a teacher, encouraging him to use it, as well as other materials, in his teaching.*

If the teacher does this on his own, it would be legal; however, if the AV supervisor does it for the teacher, it is *not* legal.

2. *A teacher prepares a transparency of a chart from a copyrighted book, on his own volition. At the end of his lesson, he files this transparency chart among his own lesson plans for future reference and use—next week, next month, or next year.*

This type of activity might become an infringement and illegal because, ". . . the use could turn into an infringement if the copies were accumulated over a period of time with other parts of the same work . . ." or because the ". . . copying displaces what realistically might have been a sale, no matter how minor the amount of money involved. . . ." *

3. *A teacher prepares a series of pictures copied from several copyrighted texts. After using this mate-*

* This direct quote and those that follow are from House Report No. 83, 90th Congress, First Session, on H.R. 2512, *Copyright Law Revision*, March 8, 1967.

rial in his classes, he files it away for future reference and use.

The House Report to the 90th Congress states that copying "could turn into an infringement if the copies . . . were collected with other material from various works so as to constitute an anthology."

4. *A science teacher prepares multiple copies of a heart diagram obtained from a copyrighted source. He distributes copies of this diagram to each student during his lesson about the heart and asks his students to retain this diagram in their notebooks and study it for future reference.*

This may be illegal! According to the doctrine of fair use, multiple copies should be limited to the size of a class, and a court may decide fair use requires that all such copies be recalled or destroyed after temporary use.

5. *A high school English chairman sees an illustration in a copyrighted book that effectively points out an important concept in poetry. He decides to cut out this picture and asks his audiovisual director for assistance in making 500 copies for distribution to all English classes.*

Illegal! Assuming that the illustration was not separately copyrighted, not only should multiple copies be limited to the size of a class, *but* circulation should also be limited to the single classroom.

6. *A drama teacher is putting on a copyrighted play. He has one copy of this 12-page play and requests that the audiovisual consultant prepare 10 copies to enable each player to have a copy of the script.*

Highly illegal! According to the doctrine of fair use, "Where the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection."

7. *A school system, equipped with closed-circuit television facilities, transmits a film that it owns into an individual classroom via closed-circuit television, upon the request of the classroom teacher.*

This action would be illegal since face-to-face teaching activities have been interpreted by the House Report to ". . . exclude broadcasting or other transmissions into a classroom whether radio or television and whether open or closed circuit." The contract under which the film was purchased by the school district prescribes the use that can be made of the film within the school program, and in most cases, the contract would forbid such use.

8. *A student wishes to see or hear a video or audio tape, film, filmstrip, slide, or transparency for purposes of independent study in a library carrel. In doing so, he individually retrieves the information electronically from a central source (e.g., video bank in the school's learning resources center).*

You guessed it; illegal! If the student (and not the teacher) activates the retrieval, such use becomes copyright infringement.

9. *A science teacher on closed-circuit television is demonstrating a frog dissection. He uses a freshly killed frog and a commercial plastic model of the internal organs of the frog.*

The showing of the commercial model of the frog that is copyrighted is illegal. At this writing, the dead frog does not have a copyright and can be exhibited both live and via closed-circuit educational television!

10. *A teacher wishes every member of his class to perform an exercise which is contained in a workbook for which he has the only copy. He duplicates the workbook exercise for the 30 pupils in his class.*

Under the new law, this practice would be considered illegal because the workbook is a consumable work—that is, once it is used, it cannot be reused. Answer sheets to standardized examinations are also considered consumable works and cannot be duplicated.

Are you beginning to be concerned about the legality of your own educational practices? Are you guilty of any of these infractions of the proposed copyright law? If so, you can take heart in the fact that the new legislation includes discretion to a court to waive statutory damages for classroom teachers who innocently infringe. However, some may argue that if you have read to this point, you can hardly classify yourself as "innocent" under the proposed law.

Now that you have seen examples of illegal educational practices as interpreted under pending legislation, you would probably like to know just what activities would be considered legal. Here, then, are eight activities that are so considered:

1. Making copies of extracts or portions of a copyrighted work, picture, or chart, that are not self-contained and that are "not substantial in relation to the

NEA Resolution 68-14:
Copyright Law Revisions

Maximum access to teaching materials is of vital concern to every teacher. The National Education Association recognizes that the present copyright law provides for two parallel sets of rights, the rights of those who create such materials to profit from their efforts through copyright and the rights of education to use certain copyrighted materials in teaching. A revision of the existing law is now being considered. The National Education Association insists that the public interest requires that the copyright law provide special recognition for education which guarantees a legal right for teachers and educational institutions to make use of copyrighted materials, recognizing a limited right to copy and record such materials for nonprofit educational purposes, including educational broadcasting.—Passed by the NEA Representative Assembly, 1968.

larger self-contained work" from which they are taken *if* you (a) limit the number of copies to one-class size, (b) do not circulate them beyond the classroom, and (c) remove the same copies from circulation immediately after temporary use

2. Making a *single* transparency of a copyrighted picture, chart, and the like, from a collective work (for example, an encyclopedia volume or a whole periodical issue) *if* you do not retain this transparency on a permanent basis

3. Having pupils use copies of an extract as an exercise in shorthand or typing or for foreign language study

4. Making and using recordings of performances by music students for purposes of analysis and criticism

5. Making without permission one or more copies of a newspaper article for class distribution and study

6. Making *one* copy of a single poem, story, or article in a collective work *but* not of the entire collective work (for example, an encyclopedia volume, a whole periodical issue)

7. Making multiple copies of a very short self-contained work, such as a four-line poem, a map in a newspaper, or a half-page vocabulary builder from a monthly magazine, unless it is a complete poem or map which is separately copyrighted

8. Making a recording (audio or video) of a radio or TV program for later use in the classroom.

Under the proposed legislation, not much else would be legal.

It was really quite simple to devise the ten situations described earlier. All I did was review and examine my daily activities as an audiovisual consultant in my own school. I plead guilty to aiding and abetting every one of the aforementioned incidents during the past school year! To compound my guilt, I have not only practiced these infringements *but* I have constantly encouraged others to engage in these potentially illegal educational activities. Indeed, by publishing articles and making convention presentations, I have spread the word on how to utilize copy techniques—without also spreading the word of the copyright hazards to be encountered.

What can and should be done?

The Ad Hoc Committee (of educational organizations) on Copyright Law Revision, of which NEA is a member, recommends that any new copyright law should be written so as to:

1. *Guarantee fair use of copyrighted materials by teachers.*

Retain Section 107 of S. 543, delete the House Committee Report's limitations, and delete Section 201(b)(2) of Title II.

2. *Assure accessibility of materials to teachers.*

Retain the present law's duration provision.

3. *Remove restrictions on educational technology.*

Delete Section 110(2)(B) and (D) of S. 543.

4. *Remove restrictions on instructional television.*

Delete Section 112(b) of S. 543 and substitute Section 112(b) from last year's H.R. 2512.

5. *Relieve innocent teachers from copyright infringement damages.*

Retain Section 504(c)(2) of S. 543 and amend it to cover librarians and ITV teachers.

Although I joke about pleading guilty, I realize, as do all educators, that copyrights must have reasonable protection; that established laws and statutes of our land must be enforced; that ignorance of the law by administrators and even classroom teachers is really no excuse for illegal practices.

At this very moment, you are in a position to influence copyright legislation. Your voices can be heard by Congress before final action is taken. You can play important roles in expressing yourselves and the educational community. You can help shape the future of copyright legislation for a long time to come.

Before you contact influential members of your community, however, you should acquaint yourselves with information and facts about current and pending copyright legislation. This article was written to arouse your interest in legal activities that will be of direct concern to you as teachers directly concerned with the improvement of education in your schools. •

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LINE OF LINGO

Research News Notes and the *New York Post*, from a "rather definitive glossary of executive terms," present these phrases that are highly applicable to the academic world.

Orientation: Move around until we find something for you to do.

Unparalleled demand: Six orders in the mail.

Note and initial: Let's spread the responsibility for this.

For your consideration: You hold the bag for awhile.

For your comment: I haven't the faintest idea myself.

Coordinator: An executive with a desk between two expediters.

Implement a program: Hire more people and expand the office.

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COPYRIGHT LAW REVISION AND ETV

by Barbara A. Ringer
Assistant Register of Copyrights
Library of Congress*

". . . educational . . . broadcasters recommend that . . . the specific exemptions be broad enough to insure the unhampered introduction and use of modern technological devices for teaching in and out of classrooms."

The present copyright law of the United States was enacted by Congress in 1909, at the very end of Theodore Roosevelt's Administration. As statutes go, it was nothing to be proud of. It was a pasted-up, thrown-together affair combining various drafts. To this day it is full of ambiguities, obscurities, inconsistencies, and complexities that the courts have never been able to settle. Bad as the statute is technically, a much worse fault is that it was written for 19th century copyright problems, which were swept away by 20th century technology within a decade of its enactment. There is probably no major federal statute in existence that can match the copyright law in anachronism and inability to cope with the problems arising under it.

The need for a general revision of the 1909 statute was recognized as early as 1924. Efforts to have Congress enact a new law have continued sporadically ever since. All have failed so far, but not from want of trying. There were various causes for this failure, but if there was one basic reason it was opposing pressures from various influential interests representing users of copyrighted works. As the communications revolution has rolled relentlessly on, these interests have proliferated in number and political power.

The latest program for general revision of the copyright law began in 1955 and has continued actively ever since. After nearly 14 years of effort uncrowned by success, it may be logical to ask whether broad-scale copyright law revision in the United States is simply too wet to plow. Only the future can answer this question, but the importance of revision is so great and the need so urgent that it would be irresponsible to give up our efforts now.

As it has evolved, the bill for general revision of the copyright law represents an effort to meet and reconcile hundreds of separate issues of law and policy. Perhaps a dozen issues can be singled out as of major importance and, while it may not fall into the make-or-break category, one of these is the problem of copyright and educational television.

The evolution of statutory provisions on the ETV issue has not followed a steady course. Nevertheless, although the many discussions on this subject have been far from placid or desultory, they have been conducted in a constructive, intelligent, and mature atmosphere notably lacking in discussions of some of the other issues. Speaking personally, as one Government observer, I have been impressed not only by the ability of the ETV representatives to present their arguments effectively, but also by their reasonable attitude, their avoidance of personal invective and simplistic attacks, and their willingness to sit down and try to find good solutions to hard problems. They are smart enough to realize that this kind of attitude gets better results in the end, and they have served their interests well.

Under the present law of 1909, broadcasts of music and of nondramatic literary works (poems, stories, novels, articles, etc., but not plays or movies) are subject to copyright control only if conducted "for profit." In his first report on general revision, published in 1961, the Register of Copyrights recommended retaining the "for profit" limitation, as an alternative to the approach in most foreign laws of writing in specific exceptions. This recommendation was strongly attacked as oversimplified and unfair by most of those attending the revision discussions during the next three years, and the Register came to agree that the "for profit" approach was dangerously vague and unrealistically broad. His 1965 report, and the bill that accompanied it, therefore provided for a general right of public performance, coupled with a specific exemption for transmissions that are "made primarily for reception in classrooms or similar places normally devoted to instruction" and that are "a regular part of the systematic instructional activities of a nonprofit educational institution." This 1965 bill and report also contained a provision allowing "ephemeral" recordings — that is, recordings made by broadcasters for rebroadcast purposes — under rather limited conditions.

Hearings

Extended hearings on the revision bill were held before a subcommittee of the House Judiciary Committee in 1965, and educational broadcasting remained a major issue. Various educational groups, including broadcasters, recommend that, if the "for profit" limitation were to be dropped, the specific exemptions be broad enough to insure the unhampered introduction and use of modern technological devices for teaching in and out of classrooms. They urged the national importance of ETV not only as an adjunct of the schools, but also in providing adult education, creating general cultural interests, combatting illiteracy, and promoting the poverty program through vocational rehabilitation classes. Pointing to the small budgets, the costs and uncertainties of clearances and royalties, and the dedicated public service ETV offers, they emphasized the need for maximum access to copyrighted materials with a minimum of redtape and expense. The ETV representatives also stressed the need for a broad privilege of making multiple copies of "ephemeral" recordings for purpose of exchange among, and re-use by, various ETV stations, as long as no profit or private gain is involved.

These arguments were countered by statements from representatives of au-

*The opinions expressed in this article are those of the author, and do not necessarily reflect the views of the Copyright Office or the Library of Congress.

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thors, publishers, and music societies urging that the ETV exemptions not be broadened further. Their principal thrust was that the line between general educational programming of a cultural nature, and sustaining or public service programs on commercial stations, is breaking down, and that in many cases the two are indistinguishable as to content, size of audience, need for copyrighted material, and impact on the copyright owner. They pointed out that educational broadcasting is growing, already reaches large audiences, and is highly subsidized, and they stressed the inconsistency in paying for performers but not for the works performed. To them it was not only a matter of an uncompensated "free ride" but also a matter of actual damage and loss of licensing markets. The copyright owners also urged that the "emphemeral recording" exemption should be strictly limited to avoid abuse.

The House Judiciary Subcommittee, after weighing these opposing arguments and considering some suggestions thrown out at joint meetings of the interests in June, 1966, revised the bill in a way that somewhat broadened the ETV exemption. Under the bill as reported in both 1966 and 1967, television broadcasts by a nonprofit organization of nondramatic literary and musical works would be free of copyright restrictions if:

(a) the transmission was a regular part of systematic instruction offered by "a governmental body or a nonprofit educational institution";
(b) the normal radius of the broadcast was 100 miles or less;
(c) the transmission is primarily for reception in classrooms, by government employees, or by persons whose disabilities or other special circumstances prevent them from attending classroom instruction; and
(d) the transmitting organization controls the time and content of the transmission (as distinguished from dial access or computer-aided instruction).

The "ephemeral" recording provision was also liberalized in favor of educational broadcasters. In general it would permit a nonprofit educational broadcaster to make two copies of a program, to exchange one of them with other ETV stations, and use the ephemeral copy up to one year from the date of first transmission.

House floor

On April 6, 1967, the bill reached the floor of the House of Representatives, where it underwent quite a mauling. The major opposition was centered around two big and explosively controversial provisions involving cable television broadcasting and jukebox performances. It was obvious from the debate, however, that educational broadcasters had friends and supporters in the House, and the provisions dealing with the 100-mile limitation and the restrictions on "ephemeral" recordings came in for particular attack.

Anticipating the opposition to the 100-mile limitation, the managers of the bill offered an amendment extending the exemptions to educational broadcasts within a state or within a 250-mile radius. In the frantic atmosphere on the House floor, however, this proposal became swallowed up in tactical maneuvering, little of which had anything to do with ETV. In an effort to provide a broad exemption for educational broadcasters, Representative B. F. Sisk (Dem., Calif.) offered a substitute amendment which, he later acknowledged, inadvertently went much further than he intended. This was adopted by a narrow margin. When debate ended on April 6, the bill had been amended to exempt all *"public transmissions for purposes of educational instruction"* from liability of any kind, but to make fully liable various other nonprofit performances that the bill had carefully specified.

When the House met again on April 11, 1967, to consider the revision bill, compromises had been reached on the CATV and jukebox issues, clearing the way to passage of the bill. As the result of some remarkably delicate parliamentary footwork, Representative Sisk was able to replace his unfortunate amendment with a new version of the educational broadcasting exemption in which only one change had been made: the 100-mile limitation was removed entirely. At the same time, the House adopted an amendment of section 112 completely exempting educational broadcasters from liability for making "ephemeral" recordings without regard to the number of copies made or the period during which they could be used. The bill passed the House of Representatives in this form by a margin of 379 to 29.

Meanwhile, about a month earlier, the Senate Judiciary Subcommittee had opened full-scale hearings on the revision bill, and representatives of educational broadcasting organizations had testified on March 16, 1967. The position put forward in the testimony and incorporated in draft statutory language drew a sharp distinction between instructional broadcasting and general noncommercial educational or "public" broadcasting. With respect to ITV, the basic arguments were that the bill's limitations on the exemptions, as to interconnection and the use of recordings, should be removed. With respect to FTV or "public" broadcasting there were two basic proposals: first, that the "fair use" doctrine should be clarified to include certain reasonable ETV uses of copyrighted material, and second, that a system of compulsory licensing should be established to assure educational broadcasters access to copyrighted works without costly clearance procedures or excessive royalties.

NET's approval

By coincidence, the next time ETV representatives were scheduled to appear before the Senate Subcommittee was April 12, 1967, the day after the House has passed the amended bill. Eugene Aleinikoff, representing NET, pointed out that the House had adopted two amendments that "went to the heart of the instructional television exemption." — The first erased the 100-mile limitation; the second removed all restrictions on the recording of instructional programs and the use and exchange of copies of the recording. Mr. Aleinikoff stressed that "these were the principal restrictions about which we had such deep concerns for instructional television," and he and other witnesses indicated general satisfaction with the "way . . . they were included in the House action." An additional argument was made for expanding the ITV exemption to include programs intended for home reception by "students regularly enrolled in nonprofit educational institutions."

The previous arguments concerning clarification of "fair use," and the availability of and access to copyrighted material, were reiterated on April 12. On the latter point, however, there were indications that, if reasonable voluntary licensing arrangements could be worked out with the copyright owners, at least some ETV representatives would prefer them to compulsory licensing.

The Senate hearings closed at the end of April, 1967. Under ordinary circumstances the Subcommittee would have moved forward to report the bill. Instead, the bill was sidetracked by the committee for the remainder of the 90th Congress. This means that a good deal of momentum has been lost and the job of getting revision legislation through the new Congress will be a good deal harder.

The complicated and explosive controversy over the copyright liability of cable television systems (CATV) was the reason the bill was stalled. Even though it held against the copyright

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owners, the Supreme Court's decision on this point in June, 1968, has clarified the picture and may eventually contribute toward enactment of a general revision of the copyright law. There are stupendous difficulties. As in other fields of the law, legislative reform is the product of striving by dedicated people against reaction and opposition from special interests, rather than the result of some vague kind of natural process. The dedicated people don't always win. Assuming the educational broadcasting profession gets pretty much what it feels it needs as safeguards in the revision bill, is it impertinent for me to wonder whether the leaders in educational broadcasting should take a stance of active support rather than grudging acquiescence?

Educational broadcasting is one of a large range of new communications techniques that are combining to place independent authorship and artistic creation in mortal danger. As far as I can see, it is the only one of those techniques that is dedicated to preserving and nurturing the individual creator in his efforts to compete with the residents of the New Grub Street and those who pay them. Imperfect as it is, copyright protection is the only weapon the law gives an author to retain his independence and pursue his profession without outside control. If this is true, and I profoundly believe it is, then the ultimate goals of educational broadcasting and of copyright law revision must be the same.

BARBARA A. RINGER has received the Library of Congress Superior Accomplishment Award and Superior Service Award, and the William A. Jump Meritorious Award for Exemplary Achievement in Public Administration. Now Assistant Register of Copyright, she began work in the Copyright Office as an examiner in 1951. Miss Ringer is Adjunct Professor of Law at Georgetown University Law Center.

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MRS. CATHARINE BARRETT, President
SAM M. LAMBERT, Executive Secretary

(10)

October 12, 1972

Mr. Arthur H. Rice
Associate Executive Secretary
Michigan Education Association
1216 Kendale Boulevard, Box 673
East Lansing, Michigan 48823

Dear Mr. Rice:

Pursuant to our telephone conversation yesterday, I am sending you herewith materials on copyright law revision. Some of the materials include examples of classroom practices that are legitimate and also include illustrations of practices that are not legitimate. Perhaps the two most important of these documents are: (1) the paper headed Typical Classroom Practices where we have outlined 33 illustrations and (2) Bernard O'Donnell's memorandum. Note the answers which the textbook publishers gave to each of these illustrations. In other words, the "yes" answer indicates they would consider this a fair use and "no" they would not consider this a fair use, or the answer might read "yes under certain conditions." Some examples were not commented on because they felt these questions were outside the sphere of their competence. This again points up the problem we face in that no one group can give you all the answers. We must turn now to newspaper and magazine publishers as well as music publishers.

In order that we might be able to answer the questions of teachers who are perplexed as to what they can and cannot do, the following information should be of some help:

Charles Lieb, the senior attorney for the Association of American Publishers feels there are two "litmus paper tests" for fair use.

(1) "Does it supplant the text?" (Is it affecting the economic rights of the author or publisher? Is it done in lieu of making a purchase?)

(2) "Are you transforming this into another format--that is, from print to non-print?"

These are the two general guidelines he gave, but these are most inadequate as far as we are concerned, and we seek to have them tested. Mr. Lieb also said that fair use for the classroom teacher to him means "anything that takes the place of something you could put on the blackboard." Again, this is absolutely unacceptable to us.

The publishers are fairly well agreed on several guiding principles: A given use of copyrighted materials is a fair use if--

(1) It is a one-time-only or sporadic use as distinguished from regular or systematic use.

(2) If the book or material is out of print and not available in printed form including microform.

(3) If it is to be used only on a test for examination purposes.

(4) If the materials are not consumable in nature (workbook exercises, standardized test materials, etc.).

(5) If the teacher does not plan to make an anthology of the materials she reproduces.

The House report on the most recent bill passed by Congress on H.R. 2512 mentioned certain guidelines for teachers that may help teachers determine which uses are fair uses. Their list includes the following:

... the nonprofit character of the school in which the teacher works. (nonprofit)

... whether any charge is made for the copies reproduced and distributed.

... whether the teacher acting on his own volition, makes one or more copies for temporary use by himself or his pupils in the classroom. (spontaneity)

... whether the materials copied are consumable. (If so, they would not be exempt.)

... whether the copy is for the teacher's own use or for the entire class.

... whether multiple copies are limited to the size of the class or are for distribution beyond the class to other classes.

... whether the school district required or suggested the copying. (If so, the copying would not be exempt.)

... whether it is a spontaneous copying of an isolated extract by a teacher or whether copies are accumulated over a period of time with other parts of the same work or are made into an anthology or collection.

... copying a single story, poem, or article in a collective work (from a magazine or newspaper or anthology).

The important thing to remember here is the need to know the full facts of the use in order to determine a given case, i.e., is it for one class or more than one? What do you wish to do with it afterwards? What are the conditions under which you use it? Is the part copied or reproduced the most important part of the whole work, such as a major musical theme or is it only a relatively

insignificant portion of the whole symphony? The complete reproduction of a fairly long poem in examination questions distributed to all members of a class might be "fair use," while the distribution of separate copies of the poem without restrictions might not be. The factors vary in every case.

Under the present 1909 law, teachers have a double-barreled protection in the uses of materials: "fair use judicially interpreted by the courts and a not-for-profit limitation which provides for limited copying of materials for purposes of teaching , scholarship, and research." Under the pending bill before Congress, S.644, fair use has been made statutory but the not-for-profit provision has been deleted from the bill. This is a serious blow for education.

As you know, the NEA was instrumental in forming the Ad Hoc Committee (of educational organizations) on Copyright Law Revision back in 1963. We have worked desperately hard on this matter and have at times made considerable progress, but the new Senate bill is a step backward as far as we are concerned and we cannot support it. Our Ad Hoc Committee now consists of 42 educational organizations, and we are finding it harder than ever to make sure that teachers are able to teach as well as they know how to teach and that they will have ready access to materials when they need them, without cumbersome clearance procedures and payment of exhorbitant royalties. We of course do not want to hurt the publishing industry in any manner, and we feel that the minimal uses which teachers make of copyrighted materials in the classroom, as well as uses by the students themselves, certainly cannot in any way damage the publisher or the author. In fact, in most cases, teachers create markets for the works of authors and give them visibility.

Teachers need reasonable certainty that a given use of copyrighted materials is permissible. We do not want to condone under-the-table uses and yet, as you can well see from the materials attached, we do not have agreement among the publishers themselves as to what is or what is not a fair use. The only guidelines at this point we can give to the conscientious teacher in deciding what is and what is not a fair use in any given case are the key words "non-profit," "spontaneity," "on the teacher's own volition," "limited to one class only," "temporary or ephemeral use," "one copy only," etc.

I hope this information will be of some help to you. Please contact me further if you feel we have not been clear or if there is additional material I might send.

Sincerely yours,

Harold E. Wigren
HEW:ekb
CC: Dr. John D. Sullivan

Section . Limitations on exclusive rights: Teaching, scholarship and research

Notwithstanding other provisions of this Act, nonprofit use of a portion of a copyrighted work for noncommercial teaching, scholarship and research is not an infringement of copyright.

For purposes of this section,

(1) "use" shall mean performance; display; exhibition; transmission; reproduction, copying and recording; storage and retrieval by automatic systems capable of storing, processing, retrieving, or transferring information or in conjunction with any similar device, machine or process;

(2) "portion" shall mean brief excerpts (which are not substantial in length in proportion to their source) from copyrighted works, except that it shall also include

(a) the whole of short literary, pictorial and graphic works such as a poem, essay, chart, map or photograph;

(b) entire works reproduced for storage in automatic systems capable of storing, processing, retrieving, or transferring information or in conjunction with any similar device, machine or process, provided that

i) a method of recording retrieval of the stored information is established at the time of reproduction for storage, and

ii) the rules otherwise applicable under law to copyrighted works shall apply to information retrieved from such systems;

(c) recording and retransmission of broadcasts within five school days after the recorded broadcast.

Provided that "portion" shall not include works which are

(a) originally consumable upon use, such as workbook exercises, problems, or answer sheets for standardized tests;

(b) used for the purpose of compilation within the provisions of Section 103(a).

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